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IN THE

Supreme Court of the United States

October Term, 1987

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III and HIRSHEL JAFFEE,

Petitioners,

– against –

YEVGEN FROMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2621

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

JUDITH A. GORDON
DOUGLAS D. ARONIN
MARTHA O. SHOEMAKER
Assistant Attorneys General
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QUESTIONS PRESENTED

1. In light of *O'Lone* v. *Shabazz* and *Turner* v. *Safley*, was the court of appeals in error in applying the least restrictive alternative test in reviewing a state inmate's free exercise claim against a prison directive that limits the length of inmates' beards for security and safety reasons?

2. In light of *O'Lone* v. *Shabazz* and *Turner* v. *Safley*, was the court of appeals in error in invalidating, on free exercise grounds, the prison directive's limitation on beard length when the court acknowledged that the security and safety reasons for the limitation are important, the limitation is rationally connected with them, the inmate can practice his religion in other ways and the public, as well as the prison population, will face increased security and safety risks if the limitation is not enforced uniformly?

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- against -

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles J. Scully, Harold J. Smith, Walter Kelly, Everett W. Jones, Thomas A. Coughlin III and Hirshel Jaffee, by the Attorney General of the State of New York, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals is reported at 817 F.2d 227. It is reproduced in the appendix to this petition at 1a-14a.

The memorandum decision of the district court is reported at 649 F. Supp. 512. It is reproduced in the appendix at 19a-39a.

Jurisdiction

The judgment of the court of appeals was entered on April 24, 1987. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

State Directive Involved

New York State Department of Correctional Services Directive No. 4914 (rev. Apr. 24, 1984) states in part:

> I. DESCRIPTION
>
> This directive establishes the basic grooming standards (including criteria for beards, mustaches, and length of hair) for inmates.
>
> * * *
>
> III. REGULATIONS
>
> A. Initial Haircut and Shave at Reception
>
> Males received as new commitments shall get an initial haircut and shave for reasons of health and sanitation as well as to permit the taking of the initial identification photograph.
>
> * * *
>
> B. General Grooming Standards
>
> After the initial haircut and shave, general grooming standards as set forth below are applicable to all inmates.

1. Beards and Mustaches

All inmates may grow a beard and/or a mustache not to exceed one (1) inch in length.[1]

* * *

Statement of the Case

A. Facts

The respondent is of the Jewish faith. Appendix ("app.") at 2a. He has been incarcerated in several facilities of the New York State Department of Correctional Services (the "Department") for the past four years, following a conviction for selling cocaine. *Id.* at 4a, 23a-25a.

The respondent was bearded when he was committed to the Department's custody on March 10, 1983. App. at 23a; amended compl't ¶ 6. He was informed that Department rules required an initial clean shave and, thereafter, permitted a beard up to one inch in length. App. at 23a, 41a-42a ¶ III(A), (B)(1) (Directive No. 4914). He complied with the initial shave requirement, expressing a religious preference for an electric razor. *Id.* 23a, 26a, 41a ¶ III(A) (Directive No. 4914).

After his initial shave, the respondent let his beard grow. App. at 23a. He apparently decided to do so after he resumed his earlier study of Jewish orthodoxy and concluded that his criminal activities coincided with a period, between 1980 and 1982, when he had been relatively nonobservant. *Id.* at 3a-4a, 22a-23a. He attributed the deterioration in his religious practices between 1980 and 1982 to his attempt, as a recent immigrant from the Soviet Union, to assimilate into American society. *Id.* at 3a-4a, 21a-23a.

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[1] Directive No. 4914 is reproduced in its entirety in the appendix at 41a-44a.

The respondent first was informed that the length of his beard violated Department rules in the Spring of 1983, while he was at Green Haven Correctional Facility. App. at 23a-24a. He responded by shaving some formerly bearded parts of his face and neck. *Id.* at 24a.

In April 1984, while at Attica Correctional Facility, the respondent requested an exemption from the beard-length requirement for religious reasons. App. at 24a. His request and a subsequent grievance were denied. *Id.* In January 1985, while at Great Meadow Correctional Facility, he was counseled for twice disobeying direct orders to trim his beard. *Id.* at 25a. In May, while at Wallkill Correctional Facility, he was found guilty of disobeying a direct order to trim his beard and penalized thirty-days segregated confinement, to be served at Downstate Correctional Facility, one-month loss of good time and one-month loss of commissary and telephone privileges. *Id.*

B. District Court Proceedings

1. Claims and Motions

The respondent began this action on August 8, 1984 by filing a *pro se* § 1983 complaint in the United States District Court for the Southern District of New York. App. at 4a. He alleged that his transfer from Green Haven to Attica was in retaliation for his religious beliefs and that he had been denied an adequate kosher diet and access to appropriate religious services. *Id.* at 19a n.1. Counsel was appointed in November 1984, and filed an amended complaint on February 11, 1985. *Id.* at 4a.

The defendants named in the amended complaint were petitioner Coughlin, the commissioner of the Department, petitioners Scully and Jaffee, the superintendent and Jewish chaplain of Green Haven, respectively, petitioners Smith and Kelly, the former and current superintendents of Attica, respectively, and petitioner Jones, the superintendent of Great Meadow. App. at 4a;

amended compl't ¶¶ 7-10, 12, 13. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343(3), (4). Amended compl't ¶ 2.

The amended complaint alleged nine claims. The first seven repeated the allegations in the *pro se* complaint. App. at 19a n.1; amended compl't ¶¶ 22-79. The eighth claim alleged that the counseling the respondent received at Great Meadow in January 1985, for refusing orders to trim his beard, violated his right to free exercise of his religion. Amended compl't ¶¶ 71-75. The ninth claim alleged that Directive No. 4914, which limits inmates' beards to one inch in length, was unconstitutional as applied to the respondent. App. at 4a, 42a ¶ II(B)(1) (Directive No. 4914); amended compl't ¶¶ 76-79. Injunctive relief and compensatory and punitive damages were sought for each of the nine claims. App. at 4a; amended compl't ¶¶ 22-79, prayer for relief ¶¶ 1, 3. In addition, a demand was made for a declaratory judgment on the ninth claim. Amended compl't, prayer for relief ¶ 2.

On April 8, 1985, the petitioners moved to dismiss the amended complaint in its entirety and, in the alternative, for summary judgment in their favor. App. at 4a. On June 12, the respondent moved for a preliminary injunction on the ninth claim. The respondent prayed for an order prohibiting the enforcement of the Directive's beard length limitation against him and directing his release from segregated confinement, one of the penalties the Wallkill disciplinary proceeding had imposed. *Id.* at 5a. On June 14, the district court granted a temporary restraining order, releasing the respondent from segregated confinement. *Id.* On July 8, the court denied the petitioners' motion only with respect to the ninth claim in the amended complaint. *Id.* at 5a, 17a-18a, 40a. On the same day, the court ordered the hearing on the prelimi-

nary injunction consolidated with the trial on the merits of the ninth claim. *Id.*

2. Trial

The consolidated hearing on the respondent's motion for a preliminary injunction and the trial on the merits of the ninth claim in the amended complaint proceeded before the district court, without a jury, in the Fall of 1985. Evidence was received concerning the sincerity of the respondent's religious belief against trimming his beard; the prohibition in Jewish law against trimming the beard; the security and safety reasons for the one-inch limitation on beard length in Directive No. 4914; and less restrictive measures as alternatives to the beard-length limitation. App. at 5a, 20a-27a, 34a-38a.

The Department's deputy commissioner for facility operations, Philip J. Coombe, testified, on petitioner's behalf, to the security and safety reasons for the limitation on beard length in Directive No. 4914. App. at 34a.[2] He gave five reasons—identification of inmates, control of contraband, fairness and personal safety and hygiene. *Id.* Daniel J. Pochoda, a New York attorney with experience in prisoners' rights, testified, on respondent's behalf, in opposition to the deputy commissioner. *Id.* at 35a.[3]

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[2] Mr. Coombe is responsible for the security of the Department's fifty correctional facilities and reports directly to the commissioner. App. at 34 n.6. From September 1980 until his appointment as deputy commissioner on February 21, 1985, Mr. Coombe was the superintendent of Eastern Correctional Facility and, from January 1977 to September 1980, he was the superintendent of Otisville Correctional Facility. *Id.*; trial transcript ("tr.") 337, 338. Mr. Coombe joined the Department in December 1959. Tr. 341.

The district court qualified Mr. Coombe as an expert in prison security and administration. Tr. 343-44.

[3] At the time of trial, Mr. Pochoda was a visiting professor in criminal justice at the City University of New York ("CUNY")

(footnote continued on next page)

The deputy commissioner testified that the Directive's one-inch limitation on beard length allows corrections personnel and other law enforcement authorities to identify inmates immediately and with reasonable certainty. App. at 34a-36a. In consequence, he said, the limitation contributes to discipline within a correctional facility because it prevents inmates from substituting for one another; reduces the likelihood that inmates will try to escape or succeed in escaping; and facilitates the prompt recapture of inmates who do escape. *Id.*; trial transcript ("tr.") at 345-47, 348, 351, 353, 354, 357, 366-68, 381-82, 513-515, 516, 534.

As the deputy commissioner explained, corrections personnel rely on appearance, particularly facial structure, as the best and most practical means of immediately identifying inmates. App. at 34a; tr. at 344-46, 347-48, 350, 351. Short one-inch beards allow immediate identification, he said, because facial structure remains visible whereas longer beards interfere with immediate identification because they obscure facial structure. App. at 34a; tr. 351, 514.[4] Short beards also allow immediate

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(footnote continued from preceding page)

Law School and an adjunct professor at CUNY's Center for Urban Education. Tr. at 396-97. Mr. Pochoda had been a staff attorney with the Prisoners' Rights Project of the Legal Aid Society from 1971 to 1975. App. at 35a n.7; tr. 397, 398.

Mr. Pochoda had held executive positions in numerous organizations that monitor prison conditions and publish reports and standards, *e.g.*, the New York State Commission on Corrections, the New York State Division of Criminal Justice Services Corrections Task Force and the New York City Board of Corrections. App. at 35a n.7. He never had any direct responsibility for the security or administration of a correctional facility. Tr. 415-17.

The district court qualified Mr. Pochoda as an expert in prison security and administration. App. at 35a n.7; tr. 418.

[4] The deputy commissioner testified that the one-inch limitation on beard length was the maximum accommodation that the Department could make for inmates if it was to continue to meet the need for immediate identification. App. at 34a; tr. 517.

(footnote continued on next page)

identification, he said, because they provide but two effective options in appearance, beard or no beard, whereas longer beards, which can be removed, shortened, rolled, braided or sectioned, interfere with immediate identification because they provide numerous options, or disguises. App. at 34a; tr. 351, 353, 374.

As the deputy commissioner also explained, if inmates can use their beards to disguise themselves, they are more likely to try to escape, and to succeed, because disguise improves their chance of leaving a correctional facility unnoticed and diminishes the risk that their absence will be detected immediately. App. at 34a-35a; tr. at 346-47, 348, 357-58, 366-68, 381-82, 513-15, 534. Inmates who can use their beards to disguise themselves also are more likely to evade prompt recapture if they escape, he said, because their ability to change their appearance makes it more difficult for law enforcement authorities, and the public, to identify them on sight. App. at 34a-35a; tr. at 351, 353, 354, 357, 366-68, 514-15.

Mr. Pochoda agreed with the deputy commissioner that beards can be a source of disguise for inmates, but, he said, the short one-inch beards the limitation permits provide the same opportunities for disguise as the longer beards it prohibits. App. at 35a; tr. 427-28. Mr. Pochoda also said that rephotographing inmates who restyle their beards or let them grow would provide a less restrictive means for satisfying the identification objective

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(footnote continued from preceding page)

The deputy commissioner also testified that, for identification purposes, he preferred inmates to be clean-shaven, which the Department required until March 11, 1982, when the one-inch limitation was introduced by a federal consent decree. App. at 34a; tr. 344-45, 514, 517. To support his preference, the deputy commissioner cited the example of two inmates who had escaped from the Green Haven visiting room after shaving their one-inch beards and changing to women's clothes in the bathroom. App. at 34a.

of the limitation. App. at 36a; tr. 424, 434.[5] He cited the New York City Department of Corrections, which does not have a limitation on beard length and relies on serial identification photographs, to support his point. Tr. at 424-26.

In rebuttal, the deputy commissioner testified that the serial photographs Mr. Pochoda proposed as an alternative to the limitation would not be practical or effective. The deputy commissioner said that the numerous photographs necessary to track length and style changes in an inmate's beard could not be distributed to law enforcement authorities, or posted for the public, quickly enough after an escape to be useful and, in any event, an inmate probably would not disclose the beard length and style he planned to wear to escape while he was in a correctional facility. Tr. 351, 353-54, 357, 359, 366-68, 382, 514-15. The deputy commissioner also pointed out that rules that might be appropriate for the New York City Department of Corrections, which has several facilities for pretrial detainees and misdemeanants, are not appropriate for the state prison system with fifty facilities and 32,600 convicted inmates, including some 25,000 convicted of violent crimes. Tr. at 506-509, 510, 511, 512, 513.[6]

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[5] Directive No. 4914 requires a clean-shaven identification photograph when an inmate is committed to the Department's custody and a subsequent identification photograph, or photographs, if an inmate changes his appearance by growing or shaving a one-inch beard or mustache. App. at 41a ¶ III(A), 43a ¶ III(C).

[6] The deputy commissioner used the federal prison system, which does not have a limitation on beard length, to illustrate the point, observing that only 17 percent of its inmates are convicted of violent crimes in contrast to 77 percent of the inmates in the New York system. Tr. at 511-12.

The deputy commissioner also observed that the California prison system, which has inmates with characteristics comparable to New York's inmates and no limitation on beard length, had 828 escapes from an inmate population of 43,000 in 1984 whereas New York had 20 escapes from an inmate population of 32,600. Tr. at 510, 513.

The deputy commissioner testified that the Directive's one-inch limitation on beard length also prevents inmates from using their beards to secrete contraband. App. at 36a. He said that he did not know of any instance of an inmate concealing contraband in a one-inch beard and that if inmates had longer beards, they would be more likely to try, and to succeed in, concealing contraband in them. *Id.* at 37a; tr. 373-75, 515-16.[7]

Mr. Pochoda acknowledged that correctional facilities need to control contraband. Tr. at 442. But he said that he was not aware of any reports of inmates secreting contraband in their beards from the New York City Department of Corrections or the federal prison system, which, like the city Department of Corrections, does not have a limitation on beard length. Tr. at 440. Mr. Pochoda also said that the searches of inmates' beards and scans with hand-held metal detectors, conducted periodically in all New York correctional facilities, provide less restrictive means for satisfying the control of contraband objective of the limitation. App. at 37a; tr. at 431, 442-43. He suggested the installation of free-standing metal detectors in interior hallways as a further precaution. Tr. at 441-42.

The deputy commissioner testified, in addition, that the Directive's one-inch limitation on beard length is a neutral rule that can be applied uniformly in a setting where exceptions increase the likelihood of confrontations between inmates and corrections personnel and between inmates and inmates (app. at 37a, 38a; tr. at 356,

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[7] At trial, one of petitioners' attorneys demonstrated that he could conceal a metal nail file, resembling a common inmate weapon, in his four-inch beard. App. at 36a-37a. When he shook his head, the nail file stayed in place. *Id.*; tr. 386-87. Another of petitioners' attorneys tried to conceal the same nail file in his one-inch beard. Tr. at 387. He could not because the nail file would not stay in place. *Id.* at 388.

379-81, 389-90)[8] and that the limitation protects the personal safety and hygiene of the inmates as well.[9]

C. Opinions

In a November 25, 1986 memorandum decision, the district court declared the one-inch limitation on beard length in Directive No. 4914 unconstitutional as applied to the respondent. App. at 39a. The court first determined that the respondent had a sincere religious belief against trimming his beard that was rooted in Jewish law. *Id.* at 21a, 27a-28a.

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[8] The deputy commissioner pointed out that the federal prison system, which does not have a limitation on beard length, had 13 violent inmate deaths in an inmate population of 32,000 in 1984 whereas the New York prison system, with almost five times more inmates convicted of violent crimes, had only seven violent inmate deaths in an inmate population of 32,600. Tr. 510, 511-12, 513.

The deputy commissioner also pointed out that the California prison system, which has inmates with characteristics comparable to New York inmates and no limitation on beard length, had 16 violent inmate deaths in an inmate population of 43,000 in 1984. Tr. 513.

[9] The deputy commissioner noted the extensive industrial and food service programs New York correctional facilities provide for inmates and said that beards longer than one-inch would increase the risk of accidents in the former and of contamination in the latter. App. at 38a; tr. 354-55, 370. He pointed out that inmates with beards conforming to the limitation are required to wear beard guards, if appropriate, when they work in either program but often remove them, apparently because the guards are uncomfortable. Tr. 355-56, 383.

The deputy commissioner also noted the risk of lice and scabies infestation and said that it would increase in relation to increased beard length. App. at 38a; tr. at 368-69.

Mr. Pochoda said, in response to the deputy commissioner, that beard guards should be sufficient to avoid any increased risk of industrial accidents or food contamination from longer beards, and, if the guards were not sufficient, the Department would have to change the work assignments of the inmates whose beards increased the risk. App. at 38a; tr. 423, 431, 433.

Mr. Pochoda also said that lice and scabies infestation had to be considered case-by-case and that if an inmate had a beard for religious reasons, it could be removed, at the direction of a physician, only as a last resort. App. at 38a; tr. 423-24.

The district court next considered the appropriate standard of judicial review for the respondent's free exercise claim against the limitation. App. at 29a-34a. The petitioners argued, under *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), that the court had to uphold the limitation if they showed that it was justified by legitimate corrections objectives and respondent did not show that the limitation represented an exaggerated response to the objectives. App. at 30a-31a.

The respondent argued, under *Wali* v. *Coughlin*, 754 F.2d. 1015 (2d Cir. 1985), that the court had to invalidate the limitation unless the petitioners proved that it was necessarily related to important corrections objectives and did not impose any greater restrictions on the respondent's religious observance than were necessary to accomplish the objectives. App. at 33a. The least restrictive alternative test that the respondent advocated was the most stringent of the three tests *Wali* adopted for reviewing prison rules restricting inmates' fundamental constitutional rights. *Id.* at 29a-30a, 32a-33a.[10]

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[10] The first of the two less stringent *Wali* tests gave nearly absolute deference to the judgment of corrections authorities. 754 F.2d at 1033. The test applied when the fundamental constitutional right the inmate asserted was inherently inconsistent with incarceration. *Id.*

The second less stringent *Wali* test required the inmate to prove that the restriction on the fundamental constitutional right he asserted was not supported by a reasonable corrections objective. 754 F.2d at 1033. The test applied when the asserted protected activity was "presumptively dangerous" or the restriction on it proscribed but one of numerous ways to engage in the activity. *Id.*

The least restrictive alternative test, which heightened the burden of proof and shifted it to the corrections authorities, applied when the asserted protected activity was not inherently inconsistent with incarceration, was not "presumptively dangerous" and when the restriction deprived, rather than limited, the inmate's right to engage in the activity. 754 F.2d at 1033.

The district court concluded that *Wali* was not inconsistent with *Bell* or *Jones* and that it was controlling. App. at 31a. The court agreed with the respondent that *Wali*'s least restrictive alternative test was applicable. *Id.* at 32-33a. It noted that it had been persuaded by the Third Circuit opinion in *Shabazz* v. *O'Lone*, 782 F.2d 416 (3d Cir. 1986) (en banc), *rev'd*, 107 S. Ct. 2400 (1987), to reject the petitioners' argument in favor of the exaggerated response test. App. at 31a-32a.

The district court then evaluated the five security and safety reasons petitioners advanced at trial for the limitation under the least restrictive alternative test. App. at 34a-38a. The court accepted, without question, the importance of each of the five reasons for the limitation at the outset of its discussion, noting, in particular, the "substantial" importance of effective identification of inmates (*id.* at 34a) and the "magnitude" of the contraband problem. *Id.* at 37a. But it held that the limitation denied the respondent his right to free exercise of his religion because the petitioners had not proved that the limitation was no more restrictive than necessary to accomplish any of its accepted security and safety objectives. *Id.* at 34a, 38a-39a.

The district court supported its conclusion by pointing out means for accomplishing the limitation's security and safety objectives that it thought would be effective and less restrictive of the respondent's religious observance. App. at 34a-38a. The court said, with respect to the limitation's inmate identification objective, that petitioners' evidence at trial established that allowing inmates to wear beards heightened the difficulties of identification. *Id.* at 34a. But, the court said, it was not persuaded that beards longer than one inch, which are prohibited by the limitation, posed significantly greater identification risks than one-inch beards, which are permitted by the limitation. *Id.* at 34a-35a. If longer beards

did pose significantly greater identification risks, the court added, serial photographs, tracking significant changes in beard lengths and styles, would provide a less restrictive means for effectively identifying inmates, albeit at potentially increased cost and inconvenience to corrections authorities. *Id.* at 36a.

With respect to the limitation's objective in controlling contraband, the court said that inmates could secrete weapons or drugs in their hair, clothing or body cavities just as easily as in their beards. The court concluded that the periodic searches and scans with metal detectors that inmates had to undergo would be as effective in detecting contraband in beards as they were in detecting contraband in, or about, the body and that the searches and scans had to be preferred to the limitation because they were less restrictive. *Id.*

In support of its observation that the inmates could secrete the weapons and drugs in their beards, the court noted that one of the petitioners' attorneys demonstrated at trial that he could conceal a metal nail file, resembling a common inmate weapon, in his four-inch beard, which would be prohibited by the limitation. App. at 36a-37a. The court did not mention that another of petitioners' attorneys demonstrated at trial that he could not conceal the metal nail file in his one-inch beard, which would be permitted by the limitation. Tr. 387.

In support of its observation that inmates could secrete weapons and drugs in their hair, clothing or body cavities as easily as in their beards, or, perhaps, in preference to their beards, the court cited the testimony of Deputy Commissioner Coombe. App. at 37a. According to the court's paraphrase, the deputy commissioner said that he had never heard of an instance of an inmate concealing contraband in his beard. *Id.* The court did not mention that, in the testimony it paraphrased, the deputy

commissioner was expressly referring to his experience under the one-inch limitation. Tr. 373-75.

The court also said that the Department could not insist on the uniform application of the limitation given the exceptions, for religious reasons, it had made to the limitation and to other prison rules. App. at 37a-38a.[11] Nor, the court said, could the Department rely on the protections the limitation provides for the personal safety and hygiene of inmates since inmates could be protected as well by less restrictive means.[12]

On January 29, 1987, the district court entered a declaratory judgment and permanent injunction, limited to the ninth claim in the amended complaint, that conformed with its memorandum decision. App. at 5a, 15a, 18a. The petitioners then appealed to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1292(a)(1) and Fed. R. Civ. P. 54(b). App. at 5a, 16a.

The court of appeals affirmed the district court judgment on April 24, 1987. App. at 1a. At the outset of the discussion of merits in its opinion, the court acknowledged that, under *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Pell* v. *Procunier*,

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[11] The exception to the limitation that the court noted permits American Indian inmates to release their hair from ponytail fasteners on ceremonial occasions. App. at 37a-38a, 42a ¶III(B)(2)(c) (Directive No. 4914).

The other exceptions the court noted permit inmates to wear religious symbols and to observe their Sabbaths and their dietary laws. App. at 38a.

[12] According to the court, beard guards were sufficient to avoid any increased risk of industrial accidents and food contamination from beards longer than one inch. App. 38a. See p. 11, n.9, *ante*. If beard guards proved not to be sufficient, the court said that inmates with beards longer than one inch could be reassigned to jobs that did not involve machines or food. *Id.*

If an inmate's beard, in fact, became infested with lice or scabies, the court said that the infestation should be treated with medicated shampoo, and the beard removed only as a last resort. App. at 38a. See p. 11 n.9, *ante*.

417 U.S. 817 (1974), an inmate's right to free exercise of his religion could be restricted by neutral prison rules that serve legitimate corrections objectives. App. at 7a.

The court of appeals then turned to *Wali* v. *Coughlin*, 754 F.2d 1015 (2d Cir. 1985), for the appropriate standard of judicial review. App. at 8a-12a. The court rejected the petitioners' several arguments that *Wali* was incorrectly decided (*id.* at 9a-11a), including the argument that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), and *Jones* did not permit a more stringent standard than the exaggerated response test. *Id.* at 9a-10a.

After reviewing the three tests *Wali* adopted (app. at 8a-9a), the court of appeals agreed with the district court that the most stringent of the tests, the least restrictive alternative test, was applicable. *Id.* at 9a. See p.12 n.10, *ante*. The court rejected petitioner's alternative argument that the only appropriate *Wali* test was the second, which applied to restrictions on protected activities that were "presumptively dangerous" or proscribed but one of numerous ways to engage in the activity. *Id.* at 8a-9a, 11a-12a. See p. 12 n.10, *ante*. According to the court, beards longer than one-inch could not be considered "presumptively dangerous" because the trial record showed that the New York City Department of Corrections and the federal and California prison systems do not have limitations on beard length. *Id.* at 11a.[13] Nor, according to the court, was it relevant that the one-inch limitation proscribed only one of the ways the respondent

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[13] The court did not mention the differences between the New York prison system and the detention facilities operated by the New York City Department of Corrections or the differences between the New York prison system and the federal prison system that appear in the record. See p. 8-9 & n.6, 11 n.8, *ante*.

The court also did not mention that the California prison system has more escapes than the New York prison system and that both the California system and the federal prison system have more violent inmate deaths than the New York prison system. See pp. 8-9 & n.6, 11 n.8, *ante*.

could be observant because the right he was asserting, to refrain from trimming his beard, was "more than a right to practice Judaism in a general way or to merely wear a beard." *Id.* at 12a.

At the conclusion of its opinion, the court of appeals reviewed the district court's application of the least restrictive alternative test to the five security and safety reasons for the limitation on beard length. App. at 12a-13a. The court agreed with the district court, for the reasons that court stated, that the limitation denied the respondent his right to free exercise of his religion because the petitioners had failed to prove that it was not more restrictive than necessary to accomplish any of its security and safety objectives. *Id.*

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with the recent decisions of this Court in *Turner* v. *Safley*, 107 S. Ct. 2254 (1987), and *O'Lone* v. *Shabazz*, 107 S. Ct. 2400 (1987). In holding that the Department directive limiting the length of inmates' beards was unconstitutional as applied to the respondent who has a religious belief against trimming his beard, the court of appeals applied a "least restrictive alternative" standard. The court relied on its prior holding that "'it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved'." App. at 9a (quoting *Wali* v. *Coughlin*, 754 F.2d 1015, 1033 [2d Cir. 1985]). The standard, which the court of appeals first announced in *Wali* as the proper test for determining the validity of regulations that infringe inmates' First Amendment rights, was expressly rejected by this Court in *Safley* and *Shabazz*.

This Court explained the correct standard for determining the validity of prison regulations which interfere with inmates' religious practices in *O'Lone* v. *Shabazz*, 107 S. Ct. at 2404-05. In that case, the Court applied to a free exercise claim, the standard it had just announced in *Turner* v. *Safley*: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 107 S. Ct. 2261. This standard, the Court made clear, was already implicit in the holdings of *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977); and *Bell* v. *Wolfish*, 441 U.S. 520 (1979). The Court expressly rejected the application of a "least restrictive alternative" test in *Safley*, holding that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." 107 S. Ct. at 2262.

Acting before *Safley* and *Shabazz*, the court of appeals considered this case in light of the standard it had previously established in *Wali* v. *Coughlin*, 754 F.2d at 1033. Under *Wali*, deference to the decisions of state corrections officials is appropriate only if the asserted constitutional right is "inherently inconsistent with established penological objectives" or is "presumptively dangerous," or if the regulation in question deprives the inmate of only one of several alternative means of exercising the right. If these conditions are not met, then any regulations restricting an inmates' constitutional rights are invalid unless prison officials can meet *Wali*'s "least restrictive alternative" test. *Id.* Applying the *Wali* standard to this case, the court of appeals held that because these conditions had not been met, the "least restrictive alternative" test was the proper standard by which to judge the Directive's validity. Finding that the Depart-

ment's legitimate interests may be served by less restrictive means, the court invalidated the Directive.

This Court expressly rejected *Wali* in *Shabazz*, 107 S. Ct. 2404 n.**. It had already rejected the multi-tiered approach in *Safley*, explaining that "[t]he determination that an activity is 'presumptively dangerous' appears simply to be a conclusion about the reasonableness of the prison restriction in light of the articulated security concerns. It therefore provides a tenuous basis for creating a hierarchy of standards of review." 107 S. Ct. at 2261.

Petitioners proved at trial that the Department's restriction on beard length served the "unquestionably important" penological interests of facilitating the identification of escaped inmates and inhibiting the concealment of contraband. App. at 34a. Deputy Commissioner Philip Coombe, the prison administrator who is responsible for security in New York State's fifty correctional facilities, testified that, in his considered professional judgment, the alternatives to the Directive suggested by respondent, rephotographing and more frequent searches, would not satisfy the "substantial and important" objective of "effective identification of inmates." *Id.* Deputy Commissioner Coombe explained that rephotographing was not a viable alternative to the Directive because distributing multiple photographs to police agencies in the event of an escape would obstruct the ability of these agencies, and the public, to identify and recapture escaped inmates quickly. Rephotographing an inmate's many changes in beard length and styling, according to Deputy Commissioner Coombe, would also tax the Department's scarce human resources and increase the opportunities for confrontation between correctional officers and inmates.

Deputy Commissioner Coombe also explained that contraband, ranging from deadly weapons to drugs, can be carried undetected in an untrimmed beard, but not in

a beard which complies with the Directive. Petitioners demonstrated this potential at trial when one of petitioner's attorneys showed that he could hide and securely hold a nail file in his four-inch beard. App. at 36a. Another attorney, who had a short beard, could not hide the nail file in his beard. Deputy Commissioner Coombe rejected the alternative suggested by the respondent of more frequent searches of inmates' beards because they would increase both the likelihood that dangerous contraband would remain undetected and the potential for confrontation between inmates and correction officers.

In *Safley*, this Court delineated four factors that should be considered in determining the validity of prison regulations subject to constitutional challenge. The first factor is the existence of "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 107 S. Ct. at 2262 (quoting *Bloch* v. *Rutherford*, 468 U.S. 576, 586 [1984]). The expert testimony of Deputy Commissioner Coombe regarding the prison administration's interests in facilitating identification and inhibiting the possession of contraband, and the courtroom demonstration of the potential for secreting contraband in a long beard, demonstrate that connection.

The second factor "is whether there are alternative means of exercising the right that remain open to prison inmates." 107 S. Ct. 2262. The record at trial shows that respondent has numerous alternative means of practicing his religion: access to kosher food, contact with rabbis, availability of religious books and other items and the right to a religious head covering. The court of appeals rejected the validity of these alternatives, holding that "requiring [the respondent] to cut his facial hair would work a total deprivation of his religious belief that the beard must not be disturbed." App. at 12a. In *Shabazz*, however, this Court considered it significant

that, although the respondents could not attend the weekly religious service at issue, which the Court noted was of "central importance" to them, "they are not deprived of all forms of religious exercise but instead freely observe a number of their religious obligations." 107 S. Ct. at 2406.

A third factor delineated in *Safley* "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 107 S. Ct. at 2262. Deputy Commissioner Coombe testified that the suggested alternatives of rephotographing and searching beards would significantly impact on both the allocation of resources and the potential for confrontation between inmates and correction officers. In the face of such an impact, the court of appeals erred in failing to "be particularly deferential to the informed discretion of correction officials." *Id.*

"[T]he absence of ready alternatives," is the fourth factor bearing on the validity of the challenged regulation. This Court held that a prison regulation may not meet the reasonable relationship test "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." 107 S. Ct. at 2262. The alternatives suggested by respondent and the courts below involve procedures that would inhibit the recapture of escaped inmates, make it more difficult to detect dangerous contraband, and increase the likelihood of confrontation between inmates and correction officers. These costs are hardly *de minimis*.

Because the court of appeals rendered its decision before the decisions of this Court in *Safley* and *Shabazz*, it did not consider the justifications advanced by petitioners in light of these recent decisions of this Court. Inasmuch as the court of appeals applied a standard of

review which this Court has since expressly rejected, this case should be remanded to the court of appeals for reconsideration under the correct standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Second Circuit vacated and the case remanded to that court for reconsideration in light of *O'Lone* v. *Shabazz* and *Turner* v. *Safley*.

Dated: New York, New York
July 23, 1987

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

JUDITH A. GORDON
DOUGLAS D. ARONIN
MARTHA O. SHOEMAKER
Assistant Attorneys General
of Counsel

APPENDIX

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1014—August Term, 1986
(Argued: April 1, 1987 Decided: April 24, 1987)
Docket No. 86-2463

YEVGEN FROMER,

Appellee,

— v. —

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS J. COUGHLIN, and HIRSHEL JAFFEE,

Appellants.

Before:
FEINBERG, *Chief Judge*, TIMBERS and ALTIMARI, *Circuit Judges.*

Appeal from a judgment entered in the Southern District of New York, Charles E. Stewart, Jr., *District Judge*, 649 F. Supp. 512 (S.D.N.Y. 1986), declaring a beard length directive unconstitutional as applied to an Orthodox Jewish state prison inmate and permanently enjoining state prison officials from enforcing the directive against the inmate or punishing him for his noncompliance.

Affirmed.

Eugene A. Gaer, New York, N.Y. (Joel W. Sternman, Neil A. Miller, and Rosenman & Colin, New York, N.Y., on the brief), *for appellee.*

Martha O. Shoemaker, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General, and Lawrence S. Kahn, Deputy Solicitor General, and Jeffrey J. Slonim, Douglas D. Aronin, and Harvey M. Berman, Assistant Attorneys General, on the brief), *for appellants.*

TIMBERS, *Circuit Judge*:

Appellants Charles J. Scully and others (collectively "appellants") appeal from a judgment entered January 29, 1987 in the Southern District of New York, Charles E. Stewart, Jr., *District Judge*, *Fromer* v. *Scully*, 649 F.Supp. 512, which granted appellee Yevgen Fromer ("appellee") declaratory and injunctive relief after a bench trial on his claim under 42 U.S.C. § 1983 (1982).

Appellee is an inmate in the custody of the New York Department of Correctional Services ("the Department"). In his amended complaint in the instant § 1983 action, appellee challenged among other things the constitutionality as applied to him of a Department Directive ("the Directive") which requires inmates to shave or trim their beards to a length of no more than one inch. Appellee claimed that his religious beliefs as an Orthodox Jew prohibit him from shaving, trimming, or cutting his facial hair and therefore that application of the Directive to him violated his right to free exercise of religion under

the First and Fourteenth Amendments to the United States Constitution.

The district court, after finding that appellee held a sincere religious belief, declared the Directive unconstitutional as applied to appellee and permanently enjoined appellants from enforcing it against him or punishing him for his noncompliance.

On appeal, appellants claim, first, that the district court applied the wrong standard in evaluating the constitutionality of the Directive; and, second, that the Directive is constitutional even when evaluated under the standard applied by the district court. Appellants do not challenge the district court's finding that appellee's religious belief regarding his beard was sincere.

We hold, first, that the district court applied the correct standard; and, second, that the court did not err in its application of that standard.

We affirm, and we do so substantially for the reasons set forth in Judge Stewart's excellent opinion.

I.

Judge Stewart's opinion contains a comprehensive recital of the facts. *Fromer, supra,* 649 F. Supp. at 513-17.

We assume familiarity with that opinion. We summarize here certain facts which warrant emphasis and those additional facts believed necessary to an understanding of the issues raised on appeal.

Appellee grew up in a small Orthodox Jewish community in the Ukraine, Soviet Union. In 1975, after moving to Brooklyn, New York, he became involved in the Lubavitch Hasidic movement. He lived and studied at a

Lubavitch yeshiva until late 1977. In 1980, his observance of Jewish laws began to deteriorate. In June 1982, he was arrested on a charge of selling cocaine. He has been in the custody of the Department since his conviction on the narcotics charge in March 1983. Soon after his incarceration began, he became convinced that his criminal activity was attributable to his failure to observe Jewish laws.

While incarcerated at the Attica Correctional Facility, appellee commenced the instant action *pro se* on August 8, 1984. His present counsel was appointed in November 1984. After his transfer to the Great Meadow Correctional Facility in January, 1985, he was disciplined twice for disobeying orders to trim his beard.

Appellee filed an amended complaint in the instant action on February 3, 1985. The amended complaint names as defendants appellant Thomas J. Coughlin, who is the commissioner of the Department, and appellant Hirshel Jaffee, who is a Jewish Chaplain at one of the prisons at which appellee has been incarcerated. Each of the other defendants—appellants in this Court—is a Superintendent of a prison at which appellee has been or is incarcerated.

The amended complaint contains nine claims, each alleging that appellants denied appellee certain constitutional rights in violation of § 1983. The Ninth Claim—the only one relevant to the instant appeal—alleges that the Directive is unconstitutional as applied to appellee to the extent that it prohibits inmates from growing facial hair in excess of one inch.

On April 8, 1985, appellants filed a motion pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the amended complaint.

In May 1985, the Department transferred appellee from the Great Meadow Correctional Facility to the Wallkill Correctional Facility. On his arrival at Wallkill, he was told that he would have to trim his beard. When he refused, he was sentenced administratively to 30 days solitary confinement at the Downstate Correctional Facility—a maximum security prison. Appellee moved by order to show cause for a preliminary injunction barring appellants from compelling him to comply with the Directive and requiring that he be released from solitary confinement. The district court granted a temporary restraining order to that effect on June 14, 1985. In an order entered July 10, the court denied appellants' motion of April 8 to dismiss the Ninth Claim of the amended complaint. The court also ordered consolidation of a hearing on appellee's motion for a preliminary injunction and a trial on the merits of the Ninth Claim. Fed. R. Civ. P. 65(a)(2).

At a six day consolidated hearing and trial in the Fall of 1985, the court heard evidence concerning appellee's religious beliefs and practices both before and during his incarceration; the place in Jewish law of the prohibition against trimming the beard; and the various justifications relied upon by the Department for the Directive.

In its opinion filed November 25, 1986, the court declared the Directive unconstitutional as applied to appellee and granted him permanent injunctive relief. *Fromer, supra,* 649 F. Supp. at 521-22.

In the judgment entered January 29, 1987 on the court's opinion, there was included a certificate pursuant to Fed. R. Civ. P. 54(b). This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1)(1982).

For the reasons set forth below, we affirm the judgment of the district court.

II.

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " The latter clause—the free exercise clause—is the basis for appellee's challenge to the Directive. That clause is made applicable to the states by the Fourteenth Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-07 (1940).

Although the free exercise clause by its terms appears to impose an absolute proscription on the power of the government, only an individual's *belief* is beyond governmental intrusion. The right to engage in a *practice* concomitant with religious belief always has been balanced against the state's interest in applying neutral rules of conduct evenhandedly to all citizens. *Reynolds* v. *United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."); *e.g.*, *Hobbie* v. *Unemployment Appeals Commission*, 107 S. Ct. 1046, 1048-51 (1987); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-15 (1972).

The legal standard by which to evaluate the constitutionality of evenhanded application of a neutral restriction varies depending on the relationship between the individual asserting the right and the governmental entity imposing the restriction. Generally, an incidental limitation on the exercise of religion caused by application of a neutral law or regulation can be justified "only by proof by the State of a compelling interest." *Hobbie*, *supra*, 107 S. Ct. at 1049. A restriction that would be impermissible

when evaluated under that test, however, may pass constitutional muster in the context of the military. *E.g.*, *Goldman* v. *Weinberger*, 106 S. Ct. 1310, 1313-14 (1986). This is because "'[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged'" *Id.* at 1313 (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)).

Where, as here, an inmate asserts a free exercise challenge to application of a neutral prison rule, special considerations require departure from the general legal standard reaffirmed in *Hobbie*, *supra*, 107 S. Ct. at 1049. True, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison", *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979), and "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam). Inmates, however, cannot expect the same freedom from incidental limitations on the exercise of their religious practices as that enjoyed by those not incarcerated. Such freedoms often permissibly are restricted in order to achieve legitimate correctional goals. In evaluating inmates' claims of constitutional deprivations, therefore, federal courts should "giv[e] appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); *accord*, *Pell* v. *Procunier*, 417 U.S. 817, 822-23 (1974). Such deference plays a vital role in reaching the "mutual accommodation between institutional needs and objectives and the

provisions of the Constitution that are of general application." *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974).

In *Wali* v. *Coughlin*, 754 F.2d 1015 (2d Cir.1985), we carefully examined these special considerations, and the Supreme Court cases from which they are derived, *id.* at 1029-33, in enunciating the legal standards to be applied to constitutional challenges by inmates. While recognizing that, "[i]n the great majority of cases, it would be sheer folly for society to deny prison officials the discretion to act in accordance with their professional judgment", *id.* at 1018, we observed that "it would be an abrogation of our responsibility as judges to assume . . . a 'hands off' posture, requiring categorical acquiescence in such judgments." *Id.* Accordingly, we articulated three standards "drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Id.* at 1033.

The first standard applies where the right asserted by the prisoner "is found not to exist within the prison context, i.e., where it is held to be inherently inconsistent with established penological objectives". *Id.* In such cases, "the proper role of the court ends with the determination that the asserted right does not inhere within the prison's walls." *Id.*

The second standard—applicable if the assertedly protected activity is "presumptively dangerous" or if the challenged restriction "proscribe[s] only one of numerous available means of enjoying protected liberties"—places the burden on the prisoner "to demonstrate

that the restriction is not supported by a reasonable justification." *Id.*

The third standard applies where "the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right". *Id.* "In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." *Id.*

In the instant case, the district court held that the third standard of *Wali* applied to appellee's challenge to the Directive. *Fromer, supra*, 649 F. Supp. at 518. We agree. Appellants make several arguments to support their claim that the court applied an incorrect legal standard. We shall examine each of appellants' arguments.

First, appellants argue that *Wali* does not apply to the instant case because it is factually distinguishable from *Wali*. In *Wali*, we struck down a content based restriction on the right of inmates to read certain printed material. Appellants contend that *Wali* should be confined to its facts and that, unlike the restriction in *Wali*, the Directive here involved is neutral on its face. We do not read *Wali* so narrowly. As must be apparent from our extended analysis in *Wali*, we intended to establish standards by which to evaluate constitutional claims of any nature brought by inmates.

Second, appellants urge us to adopt a standard not articulated in *Wali*. They assert that the "majority" of those circuits which have considered constitutional claims by inmates after *Bell, supra*, 441 U.S. 520, and *Jones*,

supra, 433 U.S. 119, have applied the "exaggerated response" standard. They cite, *e.g.*, *Tisdale* v. *Dobbs* 807 F. 2d 734, 739 n.3 (8th Cir. 1986) (declining to decide whether to adopt a " 'more restrictive than necessary' " standard since the inmate "did not present substantial evidence that the prison officials' belief was unreasonable or that their response to the security consideration was exaggerated") (quoting *Hill* v. *Blackwell*, 774 F.2d 338, 341 (8th Cir. 1985)); *Caldwell* v. *Miller*, 790 F.2d 589, 596 (7th Cir. 1986) ("Prison rules that restrain the free exercise of religion are justified only if they are 'reasonably adapted' to achieving an important penological objective"); *Madyun* v. *Franzen*, 704 F.2d 954, 960 n.7 (7th Cir. 1983) ("At least seven different standards for analyzing free exercise claims have been suggested"; no mention of "exaggerated response" standard).

An examination of these cases and others makes it clear that other circuits have not approached the problem with such uniformity as appellants would have us believe. More important, even if we were satisfied that there is the "majority" suggested by appellants, we would decline to accept their thinly disguised invitation to overrule *Wali* based on the decisions of other circuits either before or after *Wali*. We carefully analyzed *Bell*, *supra*, 441 U.S. 520, and *Jones*, supra, 433 U.S. 119, in formulating the three *Wali* standards. *Wali*, *supra*, 754 F.2d at 1029-34. In *Wali* we rejected appellant Coughlin's arguments based on those cases. *See* Brief for Appellant at 21-30 in *Wali*, *supra*, 754 F.2d 1015 (No.84-2387). We reject the same arguments again here.

Third, in another veiled invitation to overrule *Wali*, appellants argue that the instant case should be analogized to *Goldman*, *supra*, 106 S. Ct. 1310. There the Supreme Court held that the interest of the Air Force in

uniformity outweighed a commissioned officer's asserted right to wear a yarmulke indoors. The Court stated that, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative important of a particular military interest." *Id.* at 1313. We do not read *Goldman* as extending beyond the context of the military. The Supreme Court gave no indication that its holding or analysis was to apply outside the military where, the Court observed, " '[j]udicial deference . . . is at its apogee' ". *Id.* at 1313 (quoting *Rostker, supra,* 453 U.S. at 70).

Fourth, appellants argue that, even if *Wali* applies to appellee's challenge to the Directive, the district court erred in applying the third *Wali* standard. They argue that appellee's claim should be analyzed under the second *Wali* standard. They contend that a beard in excess of one inch in length is "presumptively dangerous" and that the Directive "proscribe[s] only one of numerous available means of enjoying protected liberties." *Wali, supra,* 754 F.2d at 1033. We disagree.

The evidence at trial of appellee's claim showed that the New York City, federal, and California prison systems all permit inmates to wear beards of any length. *See also Moskowitz* v. *Wilkinson,* 432 F. Supp. 947, 950 n.8 (D. Conn. 1977) (Newman, J.) (20 states permit beards in all correctional facilities). A beard in excess of one inch in length therefore cannot be considered presumptively dangerous.

We also reject appellants' argument that the Directive does not work a total deprivation of appellee's asserted right since he is permitted to wear a short beard and to practice his religion in other ways. We indicated

in *Wali* that a prison regulation does not work a total deprivation if it "does no more than define 'the time, place or manner' in which prisoners may enjoy a protected right". *Wali, supra*, 754 F.2d at 1033. Here, appellee asserts more than a right to practice Judaism in a general way or merely to wear a beard. He asserts a right to refrain from trimming, cutting, or shaving his beard. By its nature such a right can be enjoyed only at one "time, place or manner". The district court held, and we agree, that "requiring [appellee] to cut his facial hair would work a total deprivation of his religious belief that the beard must not be disturbed." *Fromer, supra*, 649 F. Supp. at 518.

Accordingly, we hold that the district court correctly applied the third *Wali* standard.

III.

Under the third *Wali* standard, a district court must determine whether prison officials have sustained their burden of showing "that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." *Wali, supra*, 754 F.2d at 1033.

In the instant case, appellants claimed that the Directive was necessary to further the governmental objectives of identification of inmates, protection against hidden contraband, fairness to other inmates, and safety and hygiene, In its well reasoned and comprehensive opinion, the district court examined each of these governmental objectives, *Fromer, supra*, 649 F. Supp. at 519-21, and concluded that appellants had failed to establish that

the Directive is no greater than necessary to effectuate them. *Id.* at 519.

On appeal, appellants repeat those arguments made to, and properly ruled upon, by the district court. We have examined all of appellants' arguments on this claim and hold that they are without merit for the reasons stated by the district court. Further discussion by us would entail nothing more than a paraphrasing of a stellar district court opinion.

Accordingly, we hold that the district court correctly applied the third standard of *Wali*.

IV.

To summarize:

In all but the most extraordinary cases, courts must pay high deference to decisions of prison officials which have the incidental effect of restricting inmates' constitutional rights. This well established principle was central to our formulation in *Wali* of the standards by which to evaluate inmates' claims of constitutional deprivations.

In the instant case, we agree with the district court that a beard in excess of one inch is not presumptively dangerous and that the Directive, if applied to appellee, would work a total deprivation of his religious belief that the beard must not be disturbed. Accordingly, we hold that the district court correctly concluded that appellee's challenge to the Directive falls into the narrow class of cases that should be evaluated under the third standard of *Wali*. We also hold that the court correctly applied that standard.

We affirm the judgment of the district court granting appellee declaratory and injunctive relief on his Ninth Claim in the amended complaint.

Affirmed.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YEVGEN FROMER,

Plaintiff,

-against-

CHARLES J. SCULLY,
HAROLD J. SMITH,
WALTER KELLY,
EVERETT W. JONES,
THOMAS A. COUGHLIN III,
and HIRSHEL JAFFEE,

Defendants.

84 Civ. 5612(CES)

JUDGMENT

Plaintiff having moved this Court for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure; and the Court having, by order dated July 8, 1985, and modified January 16, 1987, consolidated a hearing of that motion with a trial on the merits of the Ninth Claim for Relief; and the Court having, by opinion and order dated November 25, 1986, granted plaintiff's motion and finally determined the Ninth Claim for Relief; and it now appearing to the Court that there is no just reason for delay in the entry of judgment on the Ninth Claim for Relief, it is

ORDERED AND ADJUDGED, that the portion of Directive # 4914 of the New York State Department of Correctional Services which requires inmates to trim their beards to one inch in length is declared unconstitutional as applied to plaintiff; and it is further

ORDERED AND ADJUDGED, that defendants and their officers, agents, servants, employees and attorneys ("defendants") are enjoined from trimming, shaving, or in any other way shortening plaintiff's beard; from ordering plaintiff to trim, shave or otherwise shorten his beard; from punishing plaintiff for refusing to trim, shave, or otherwise shorten his beard; and from withholding any privileges and benefits from, or taking any other adverse action against, plaintiff because of his refusal to trim, shave or otherwise shorten his beard; and it is further

ORDERED AND ADJUDGED, that defendants shall restore to plaintiff all good time credits and any other privileges and benefits lost because of his past refusals to trim his beard and shall expunge from his record all references to disciplinary proceedings held because of those violations; and it is further

ORDERED AND ADJUDGED, that, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, it is expressly determined that there is no just reason for delay in the entry of this judgment, and it is expressly directed that judgment enter accordingly.

Dated: New York, New York
January 27, 1987

/s/ Charles E. Stewart
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK MODIFYING ORDER CONSOLIDATING HEARING ON PRELIMINARY INJUNCTION WITH TRIAL *NUNC PRO TUNC*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YEVGEN FROMER, *Plaintiff,* *-against-* CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III, and HIRSHEL JAFFEE, *Defendants.*	84 Civ. 5612(CES) ORDER

CHARLES E. STEWART, District Judge:

This Court having issued an order on July 8, 1985 pursuant to Rule 65(a) of the Federal Rules of Civil Procedure consolidating the hearing on plaintiff's application for a preliminary injunction with a trial on the merits with respect to the Eighth and Ninth Causes of Action set forth in the amended complaint; and the said hearing having taken place, and the Court having rendered its decision by an opinion dated November 25, 1986; and the said decision having determined plaintiff's claim for injunctive relief and having made no determination on any claim for monetary damages, it is

ORDERED, that this Court's order of July 8, 1985 is modified, *nunc pro tunc*, to consolidate the hearing on

the application for a preliminary injunction with a trial on the merits with respect to the Ninth Cause of Action, and to reserve determination of the Eighth Cause of Action to the time of disposition of the remainder of the complaint in this action.

Dated: New York, New York
January 16, 1987

/s/ Charles E. Stewart
United States District Judge

MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YEVGEN FROMER, *Plaintiff,* *-against-* CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III, and HIRSHEL JAFFEE, *Defendants.*	84 Civ. 5612(CES) MEMORANDUM DECISION

STEWART, District Judge:

Plaintiff Yevgen Fromer, an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), challenges the constitutionality of DOCS Directive #4914 to the extent that it requires him to shave or trim his beard to a length of no more than one inch.[1] Fromer, an Orthodox Jew, claims that his religious beliefs prohibit him from shaving or trimming his facial hair. During the six days of trial in this action, we heard

[1] Plaintiff commenced this action pro se in 1984 claiming retaliatory transfer and deprivation of kosher food and religious services. Following appointment of counsel, Fromer filed an amended complaint which added claims regarding the beard restriction. By order dated July 8, 1985, we consolidated the hearing on plaintiff's application for a preliminary injunction with the trial on the merits of the beard claims.

from numerous witnesses regarding the sincerity of Fromer's religious beliefs and the concerns of DOCS that underlie the beard regulation. We now conclude that Fromer is entitled to the injunctive and declaratory relief that he seeks. Our findings of fact and conclusions of law are set forth below.

SINCERITY OF RELIGIOUS BELIEF

Directive #4914 establishes basic grooming standards for inmates in the New York state prison system. Pl. Ex. 1. The directive provides that upon being committed to the custody of DOCS, inmates must get a haircut and shave "for reasons of health and sanitation as well as to permit the taking of the initial identification photograph." Thereafter, however, "[a]ll inmates may grow a beard and/or mustache not to exceed one (1) inch in length."

In order to establish his first amendment interest in challenging Directive #4914, Fromer, as an initial matter, must demonstrate that his beliefs are sincerely held and "are, in his own scheme of things, religious." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); *see also Furqan* v. *Georgia State Board of Offender Rehabilitation*, 554 F. Supp. 873, 876 (N.D. Ga. 1982). In evaluating the religious nature of Fromer's beliefs, this court must not employ an objective, content-based approach to defining religious belief but rather must examine the plaintiff's "inward attitudes towards a particular belief system." *Patrick* v. *LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984).

Plaintiff asserts that his refusal to trim his beard is based on the Torah, specifically, on a passage in Leviticus, one of the five books of Moses, which states that one should not mar the corners of the beard. Tr. 104. Fromer testified that he views the wearing of an

untrimmed beard as "the main bulwark that would be used against evil," Tr. 103, in that the beard is a physical, unalterable, public symbol of Jewish law "to the highest degree." Tr. 103-04, 234-35. Fromer further stated that he wants to leave his beard untrimmed "to prevent myself from any further breaking the law, civil law or Jewish law or any law, and stay with the hundred percent way of Judaism." Tr. 114.

We find that Fromer has met his burden of showing that his refusal to obey Directive #4914 is grounded in a sincere religious belief that trimming the beard violates Jewish law. Fromer's refusal to trim his beard is consistent with his religious background and training and is rooted in a body of Jewish law. Furthermore, we find Fromer's testimony regarding his religious beliefs to be credible and find his conduct since he entered prison to be consistent with his professed beliefs.

Fromer was born in 1959 in a town in the Ukraine, Soviet Union, where he lived until the age of fifteen. Tr. 81-82. As Orthodox Jews, Fromer's family members observed "all the practices . . . most orthodox Jews do" in the United States, including, for example, keeping Passover strictly. Tr. 83. Members of Fromer's family were leaders in the town's small Jewish community, and weekly religious services were held in Fromer's house. Fromer himself as a child learned how to read Hebrew and studied the Bible with various teachers. At age thirteen he had a bar-mitzvah and began to observe the religious practices imposed upon adult men. Tr. 83-88.

While he was in the Soviet Union, Fromer did not receive religious instruction regarding the maintenance of a beard. On cross-examination, Fromer admitted that before he left the Ukraine, the general practice of his male relatives was to either trim or shave their beards.

Tr. 164. However, Fromer also testified that he was told that the rabbi grandfather after whom he was named had an untrimmed beard all his life. Tr. 166. Also, one of the two shoctim, or religious officials, in his community had an untrimmed beard. Tr. 165. Fromer resolved in his youth that "one day when I will be able to I will have a beard." Tr. 89.

In 1975, Fromer and his mother arrived in Brooklyn. Tr. 90. Shortly after his arrival, Fromer enrolled in two yeshivas associated with the Lubavitch Hasidic movement. He moved into a Lubavitch dormitory, where he lived until late 1977. Tr. 90-91. During this period he did not discuss with any of his teachers or relatives whether trimming the beard was permitted. Tr. 174. Fromer knew that at least some of his uncles trimmed their beards. However, he observed that all the teachers at his yeshivas had long untrimmed beards and that none of the boys who lived in his dormitory trimmed their facial hair. Tr. 91-92, 94, 96-97, 224.

Around late 1977, Fromer became a bus driver for schools operated by the Lubavitch movement. Fromer continued his religious studies with two men, who told him that Orthodox Jews were forbidden to disturb their beards. Tr. 94. In early 1978, Fromer went to Los Angeles to assist a rabbi in starting a Lubavitch camp for Russian immigrants. Tr. 96. Fromer returned to Brooklyn in late 1978 and started a transportation business that primarily serviced yeshivas. Tr. 97.

During the years when Fromer was enrolled in the yeshivas and was in Los Angeles, he maintained an untrimmed beard. Tr. 97. However, around 1980, he experienced a business setback and decided that if he became more assimilated into the society around him, he would be able to gain more customers. Accordingly, he began

trimming his beard and then shaved it off entirely. In addition, he grew his hair longer, shortened his prayers, and wore his yarmulke sporadically. Tr. 98-99. During this period, he engaged in the criminal activity that led to his incarceration.

Fromer testified that in early 1982 he decided that he wanted to resume Jewish religious practices. He began to grow his beard again and vowed that he would completely return to Judaism after his financial problems were over. Tr. 100. At the time of his arrest on a charge of selling cocaine in June 1982, he was bearded. Tr. 102.

During the eight months Fromer spent in the Brooklyn House of Detention prior to his sentencing, he did not trim his beard. Fromer testified that he came to believe that he had ended up in prison because he had failed to abide by Jewish law. Accordingly, he began to study Judaism and observe religious practices that he had previously abandoned. Tr. 103-04.

Fromer entered the custody of DOCS in March 1983. Upon his admission to Downstate Correctional Facility, he was told that he was required to remove his beard. Fromer testified that he requested that an electric shaver rather than a razor be used if he had to be shaved, Tr. 105-07, because he believed that using an electric shaver was less of a violation of Jewish law than using a razor. *See* Tr. 180. As a result of his request, Fromer stated, he was handcuffed and prodded with a stick by one correction officer while another shaved him with a razor. Tr. 107.

After this initial shave, Fromer let his beard grow undisturbed until an officer at Green Haven Correctional Facility, where Fromer had been transferred, told him to bring his beard into compliance with the one-inch regula-

tion. Fromer then requested that his mother send him an electric shaver, which he used to shave the upper part of his cheeks and neck. However, Fromer did not shave his jaw or near his ears in order to comply with the biblical prohibition on marring "the five corners of the beard." Tr. 109-10.

In the summer of 1983, Fromer was transferred to a different cellblock within Green Haven. At that time, Fromer stopped shaving and trimming his beard completely, both because no correction officer pressured him and because his conviction that his beard should not be trimmed became strengthened. Tr. 113-14. Fromer had intensified his study of Judaism and had attended a sermon by a Lubavitcher regarding the reasons why Jews have untrimmed beards. Tr. 220, 226. In addition, Fromer was influenced by the fact that Sheldon Silver, an attorney and rabbi with whom Fromer met to discuss religious practices at Green Haven, had a long untrimmed beard. Tr. 226-28.

In April 1984, Fromer was transferred to Attica Correctional Facility, where he was told to trim his beard to one inch. Tr. 121. Fromer wrote to Superintendent Harold J. Smith to protest that the application of Directive #4914 to him violated his first amendment rights. Pl. Ex. 7A. Fromer stated that as an Orthodox Jew, he considered his beard part of his "religious dress." He added that he did "not claim exemption in the cutting of my beard out of personal appearance objectives, but rather out of religious tenets." After Smith denied Fromer an exemption, Fromer filed a grievance with the Attica inmate grievance committee. Pl. Ex. 7B. Although the grievance was denied, Fromer never received a direct order to trim his beard while at Attica, nor did he receive any misbehavior reports there. Tr. 136.

In January 1985, Fromer was transferred to Great Meadow Correctional Facility. Tr. 138. Rabbi Weinberg, the Jewish chaplain at Great Meadow, requested that Deputy Superintendent Cassidy excuse Fromer from shaving or trimming his beard, explaining: "Y. Fromer is an Orthodox Jew of Lubavitch Hassidic sect. These Jews, for religious reasons do not shave or trim their beards." Pl. Ex. 24. However, Fromer was twice disciplined for disobeying an order to trim his beard and required to submit to counseling. Pl. Ex. 8-11. In February 1985, Fromer commenced the portion of this action which challenges Directive #4914.

In May 1985, Fromer's request to be transferred from Great Meadow, a maximum security prison, to Wallkill Correctional Facility, a medium security prison, was granted. Tr. 148. On the day he arrived at Wallkill, he was told that he would have to trim his beard. Fromer explained that this lawsuit was pending in federal court. Tr. 149. However, Fromer was found guilty of failing to comply with a direct order to trim his beard and was subsequently sentenced to thirty days in a special housing unit. Pl. Ex. 13. Inmates in special housing units are confined to their cells twenty-three hours per day and are denied many of the privileges available to general population inmates. Because Wallkill has no special housing unit, Fromer was transferred to Downstate to serve his sentence. Tr. 152. In addition, Fromer lost one month of good time as well as commissary and telephone privileges. In June 1985, this court granted Fromer's motion for injunctive relief barring enforcement of Directive #4914 against him and directing his release from the special housing unit.

To demonstrate that his beliefs regarding his beard are grounded in Jewish law, plaintiff presented the testi-

mony of Rabbi Moshe Wiener,[2] who has written a treatise on the growth and cutting of the beard in Jewish law. Rabbi Wiener testified extensively as to the origins of the biblical prohibition on disturbing the beard and stated that "it is the opinion of the mainstream of Jewish authorities throughout the centuries that even trimming the beard should be definitely avoided and proscribed according to Jewish law." Tr. 21. He explained:

> [T]he custom of Jews . . . throughout the centuries was not to disturb the beard in any manner whatsoever. In fact, the cutting of the beard was always considered an act of religious desecration and sacrilege and was considered an act of basic negating of one's religious functions and religious beliefs.

Tr. 20. Rabbi Wiener testified that, in his opinion, an observant Jewish man is required to refuse to comply with the portion of Directive #4914 that limits beards to one inch in length. Tr. 30.

As evidence of plaintiff's insincerity, defendants point to the facts that Fromer did not ask a rabbi whether he should trim his beard, Tr. 218-20, and that he cut his hair on a day when Jewish law would appear to prohibit such an activity. Tr. 195. They characterize his account of his initial forcible shave at Downstate as "manifestly incredible," noting that Fromer failed to file a grievance after this alleged incident and that no "use of force" or "unusual incident" report was written up by corrections personnel. Tr. 320-21. In addition, a counselor at Great Meadow described plaintiff's attitude toward his beard problem as "lighthearted." Tr. 289. Defendants further argue that Fromer, during a visit with his mother and

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[2] Rabbi Wiener has been ordained by the Mirrer Yeshiva and the United Lubavitcher Yeshiva and is presently director of the Jewish Community Council of Greater Coney Island. Tr. 9-10.

cousin at Wallkill, nodded when his cousin assured a counselor that plaintiff would trim his beard. Tr. 259. Finally, they cite to Fromer's inconsistent adherence to an Orthodox Jewish lifestyle and assert that Fromer did not cease trimming his beard until he began this action.

As their religious expert, defendants called Rabbi Moshe Tendler, a professor of Talmudic law at Yeshiva University.[3] Rabbi Tendler testified that although Jewish law prohibits shaving the face with a razor, Tr. 620, "with the rarest exception, all people who consider themselves to be meticulously observant in Jewish law" believe that trimming the beard is not only allowed but indeed is required before certain holidays and events. Tr. 617. Rabbi Tendler further stated that Jewish law requires obedience to the civil law of the state, including prison regulations, as long as not anti-semitic in nature. Tr. 631-32. According to Rabbi Tendler, Jewish law would also require Fromer to accede to his mother's request to trim his beard in order to avoid a transfer to another prison that would make it more difficult for her to visit him. Tr. 635-36.

We find that the evidence, taken as a whole, establishes the sincerity of Fromer's religious belief. Fromer's refusal to trim his beard is consistent with his upbringing as an Orthodox Jew and with his education at Lubavitch yeshivas. Moreover, Rabbi Wiener's testimony established that the practice of not disturbing the beard is grounded in a recognized body of Jewish doctrine. Although Rabbi Tendler vigorously disputed Rabbi

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[3] Rabbi Tendler was ordained by Yeshiva University and is chairman of the biology department there. He is a member of the Beth Din rabbinic court and is on the executive committee of the Union of Orthodox Rabbis of the United States. His father-in-law was Rabbi Moshe Feinstein, a leading Talmudic scholar until his death earlier this year. Tr. 602-04.

Wiener's views, he did concede the existence of rabbinical opinion prohibiting the trimming of the beard. We do not attempt to resolve the controversy between the two rabbis, for "the judicial process is singularly ill equipped to resolve [intrafaith] differences in relation to the Religious Clauses." *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981). Furthermore, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Id.* at 715-16; *accord, Moskowitz* v. *Wilkinson*, 432 F. Supp. 947, 949 (D. Conn. 1977) ("[T]he fact that some Jews do not object to shaving, or that others accept the distinction between shaving and cutting, does not defeat the plaintiff's claim. It is his own religious belief that is asserted, not anyone else's."); *Monroe* v. *Bombard*, 422 F. Supp. 211, 215 n.4 (S.D.N.Y. 1976) ("It is not for the courts to decide which practices or observances are or are not strict requirements of a particular faith.").[4]

The sincerity of Fromer's belief is also evinced by his conduct since his incarceration. Although it is obvious that Fromer at times has departed from the tenets of his faith, we are persuaded that his commitment to Orthodox Jewish observance has intensified as a result of his religious studies and reflection while in prison. Furthermore, having examined the photographs in evidence, we find that Fromer has been consistent in his refusal to trim his beard since the end of summer 1983, even though repeatedly threatened with disciplinary action.

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[4] Plaintiff's Exhibits 23, 24, and 25 and defendants' Exhibit BB, all of which were offered after trial, were admitted into evidence.

STANDARD OF REVIEW

Having found that Fromer has a sincere, religious belief which prohibits him from trimming his beard, we must determine what standard of review to apply to Fromer's claim that Directive #4914's grooming requirements infringe upon his first amendment right to freely exercise his religion. We begin with the proposition that "[a] prisoner does not shed . . . basic First Amendment rights at the prison gate." *Procunier* v. *Martinez*, 416 U.S. 396, 422 (1974) (Marshall, J., concurring). Furthermore, "a prisoner retains those First Amendment guarantees, including the right to participate in practices which are an integral part of his religious faith, 'that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Moorish Science Temple of America, Inc.* v. *Smith*, 693 F.2d 987, 990 (2d Cir. 1982) (quoting *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974)). Because security is the main objective of prison administration, however, "prison officials must have broad latitude to adopt rules that protect the safety of inmates and corrections personnel and prevent escape or unlawful entry." *United States* v. *Cohen*, 796 F.2d 20, 22 (2d Cir.), *cert. denied*, 93 L. Ed. 2d 122 (1986) (citing *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979)).

In *Wali* v. *Coughlin*, 754 F.2d 1015 (2d Cir. 1985), the Second Circuit recently set out a tripartite standard by which to evaluate claimed violations of prisoner rights. The standard is "drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Id.* at 1033. First, where the right asserted is held to be inherently inconsistent with established penological objectives,

judicial deference to the judgment of corrections officials should be nearly absolute. Second, where the activity sought to be engaged in is presumptively dangerous, deference should be extremely broad, though not categorical. Third,

> [w]here . . . the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate. In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved.

Id.

Defendants argue that the *Wali* analysis does not govern here. As they point out, *Wali* was a first amendment censorship action involving a prior restraint on access to information, not a free exercise of religion suit. Defendants contend that under *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979), when an inmate brings a free exercise challenge to a regulation justified by legitimate penological objectives, courts must defer to the judgment of expert prison administrators unless the inmate can show, by substantial evidence, that the regulation constitutes an exaggerated reaction to security considerations. Defendants point out that such a standard has been adopted by a number of circuits. *E.g.*, *Hill* v. *Blackwell*, 744 F.2d 338, 342-43 (8th Cir. 1985); *Madyun* v. *Franzen*, 704 F.2d 954, 959-60 (7th Cir.), *cert. denied*,

464 U.S. 996 (1983); *St. Claire* v. *Cuyler*, 634 F.2d 109, 114-15 (3d Cir. 1980).

We find the *Wali* case to be controlling here. We first note that the *Wali* court's analysis of Supreme Court precedent included *Jones* v. *North Carolina Prisoners Union* and *Bell* v. *Wolfish*. Moreover, we are persuaded by the Third Circuit's conclusion in *Shabazz* v. *O'Lone*, 782 F.2d 416 (3d Cir.) (en banc), *cert. granted*, 107 S. Ct. 268 (1986), that the standard proposed by defendants "provides inadequate protection for the rights of prisoners freely to exercise their religion." *Id.* at 417; *see also id.* at 420.

In *Shabazz*, Muslim prisoners challenged prison regulations that prevented them from attending weekly religious services as violative of their first amendment rights. The *Shabazz* court found *St. Claire*'s "exaggerated response" standard, 634 F.2d at 114-15, which defendants urge us to adopt, to be flawed because it failed to "require any inquiry into the feasibility of accommodating prisoners' religious practices." *Shabazz*, 782 F.2d at 420. Rather, "a 'mutual accommodation' between the important institutional objective of security and the constitutionally protected rights of prisoners" is required under *Bell* v. *Wolfish*, 441 U.S. at 546, and *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974). *Shabazz*, 782 F.2d at 419. To replace the *St. Claire* standard, the Third Circuit adopted the following analysis for cases involving free exercise rights:

> [T]he state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which [the inmates'] religious rights can be accommodated without creating bona fide security problems.

Shabazz, 782 F.2d at 420. In the context of the case before us, the *Shabazz* analysis is substantially identical to the third part of the *Wali* standard of review.

We hold that the third *Wali* standard governs the case before us. The first standard is inapplicable because the right of prisoners to wear beards is not inherently inconsistent with established penological objectives. *See Burgin* v. *Henderson*, 536 F.2d 501 (2d Cir. 1976); *Sostre* v. *Preiser*, 519 F.2d 763, 764 (2d Cir. 1975); *Moskowitz* v. *Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977); *Monroe* v. *Bombard*, 422 F. Supp. 211 (S.D.N.Y. 1976). The second standard does not apply because unrestricted beard growth is not presumptively dangerous[5] and because requiring Fromer to cut his facial hair would work a total deprivation of his religious belief that the beard must not be disturbed.

The third *Wali* standard, furthermore, is consistent with prior Second Circuit cases concerning beards in prison. In *Burgin*, Sunni Muslim prisoners asserted their first amendment right to grow beards. While remanding for factual development, the Second Circuit set forth the following standard:

> "But even if the institutional purpose [in prohibiting beards] is legitimate and substantial, 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, [364 U.S. 479, 488 (1960)], *Procunier* v. *Martinez*, [416 U.S. 396, 413 (1974)]"

Burgin, 536 F.2d at 504 (quoting *Sostre*, 519 F.2d at 764 (inmate challenge to "no beard" prison rule)). The "least restrictive alternative" analysis has also been employed by two district courts to strike down the no-beard

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[5] See our discussion of the government's security concerns below.

rule as applied to prisoners who declined to remove their beards on the basis of sincerely held religious beliefs. *Moskowitz*, 432 F. Supp. at 951 (Orthodox Jew in federal prison); *Monroe*, 422 F. Supp. at 218 (Sunni Muslims in state prison); *see also People* v. *Lewis*, No. 356, slip op. (N.Y. Nov. 11, 1986) (portion of Directive #4914 requiring Rastafarian inmate to cut dreadlocks for initial photograph held unconstitutional under either the "least intrusive means" or "exaggerated response" test, because facial features can be fully exposed merely by pulling hair back), *aff'g*, 115 A.D.2d 599, 496 N.Y.S.2d 258 (2d Dep't 1985); *Phillips* v. *Coughlin*, 586 F. Supp. 1281, 1285 (S.D.N.Y. 1984) (Directive #4914's requirement that all inmates submit to initial shave upheld as "least intrusive method available" to satisfy state's interest in photographing facial features); *Gallahan* v. *Hollyfield*, 670 F.2d 1345, 1346 (4th Cir. 1982) (least restrictive alternative standard used to enjoin cutting of Cherokee Indian's hair); *Wright* v. *Raines*, 457 F. Supp. 1082, 1088 (D. Kan. 1978) ("no beard" regulation struck down as applied to Sikh inmate because regulation does not represent least restrictive method of obtaining goal of security.)

Accordingly, defendants must show that application of the one-inch beard restriction is "necessary to further an important governmental interest." *Wali*, 754 F.2d at 1033. In addition, they must establish "that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." *Id.*

GOVERNMENTAL INTERESTS

Philip J. Coombe,[6] Deputy Commissioner for Facility Operations of DOCS, testifies that the governmental interests in identification of inmates, control of contraband, fairness, safety, and hygiene all necessitate the one inch limit on beards. While each of these interests is unquestionably important in the prison setting, we conclude that defendants have not established that the beard restriction is no greater than necessary to effectuate the governmental objectives involved.

Identification

The governmental interest in effective identification of inmates to insure prison security and to facilitate apprehension of escaped inmates is important and substantial. *Moskowitz*, 432 F. Supp. at 950. Defendants' evidence establishes that allowing inmates to wear beards poses heightened difficulties in identification. Coombe testified that two inmates escaped from the Green Haven visiting room after shaving their beards and donning women's clothing in the bathroom. Tr. 347, 376.

We are not persuaded, however, that beards longer than one inch pose a significantly greater risk than beards of one inch or less. Coombe testifies that while he would prefer to require inmates to be clean-shaven and to wear their hair short, the prison system can tolerate beards up to one inch because facial structure is still visible when the beard is short. Tr. 351. He argued that a long, untrimmed beard would provide an inmate with a set of disguises, in that the inmate could roll, braid, or otherwise manipulate his beard. Tr. 353. The fact that

[6] Mr. Coombe is responsible for the security of the fifty correctional facilities operated by DOCS and reports directly to Commissioner Coughlin. He has served as superintendent of the Otisville and Eastern Correctional Facilities. Tr. 337-38, 341.

an inmate has innumerable opportunities for instant disguise increases his willingness to escape and makes an escape attempt more likely to succeed. Tr. 381-82.

On this point, we are more inclined to accept the testimony of plaintiff's prison expert, Daniel J. Pochoda,[7] who disagreed with Coombe's assertion that a one-inch beard allows significantly better observation of an inmate's facial structure than does a longer beard. In Pochoda's view, "the change in appearance is brought about by a beard of one inch versus no beard at all, as opposed to a difference of one inch and two or three or four or longer." Tr. 428. Under Directive #4914, inmates currently have the option of keeping their hair in any length and any style and of keeping their mustaches and beards in any style not exceeding one inch in length. Since inmates may drastically change their appearances in numerous ways while still complying with Directive #4914, we are not persuaded that the additional disguise options of a braided or rolled beard would lead to an increase in escape attempts or in disciplinary problems within the prison.[8]

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[7] Pochoda has worked as a staff attorney with the Prisoners' Rights Project of the New York Legal Aid Society, executive director of the New York State Commission of Corrections, director of the Minimum Standards Unit of the New York City Board of Corrections, chair of a corrections task force of the New York State Division of Criminal Justice Services, and president of the Correctional Association of New York. Tr. 398-408.

We reject defendants' assertion that Pochoda's expert testimony must be disregarded because his "political convictions are very radical." Defendants' Post-Trial Memorandum at 30. We also find defendants' contention that Pochoda "assisted [Attica] inmates in efforts to leverage their demands through illegal strikes" in 1983 to be unsupported. *Id.* at 84.

[8] Defendants' contention that long beards would pose a significant security threat is also undermined by the fact that the escape rate

(footnote continued on next page)

To the extent that the one-inch beard restriction does promote identification of inmates, that objective can be obtained by the less restrictive means of rephotographing the inmate whenever the growth of his beard significantly changes his appearance.[9] Directive #4914 already requires a clean-shaven picture of every inmate upon entry to the prison system. In addition, Directive #4914 provides that an inmate can be rephotographed at his own expense "[i]f, in the opinion of the Correction Officer or Supervisor, an inmate drastically changes his appearance by changing the length of his hair or growing or shaving a beard and/or mustache." "While such an alternative may be administratively inconvenient or financially burdensome, such difficulties do not suffice to excuse the state from according basic constitutional rights to inmates." *Monroe* v. *Bombard*, 422 F. Supp. at 217.

Contraband

Defendants contend that the one-inch beard rule is necessary to prevent inmates from concealing contraband. One of defendants' attorneys demonstrated at trial that he could secrete and securely hold a nail file in his four-inch beard. Tr. 385-86. A nail file resembles a

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(footnote continued from preceding page)

in New York is one of the lowest in the United States, Coombe, Tr. 348, and by the experience of other prison systems that allow beards of any length. The New York City, federal, and California prison systems all do not restrict beards. Pl. Ex. 18; Combe, Tr. 513. Pochoda, who conducted research in the city correctional system for two years while drafting minimum standards for the New York City prisons, testified that the city has not encountered any problems in security, identification of inmates, safety, or hygiene resulting from its lack of beard restrictions. Tr. 433.

[9] Defendants argue that obtaining photographs of inmates wearing all the variations that could be adopted with a long beard would be impossible. However, photographs of the multiplicity of appearances possible with various hairstyles and facial hair not exceeding one inch are not considered necessary by DOCS.

shank, or sharpened piece of metal, which inmates use as a weapon. Tr. 352.

While we recognize the magnitude of the contraband problem facing prison authorities, we find that drugs or weapons could be hidden at least as easily in an inmate's long hair, clothing, or body as in his beard. In fact, defendants' expert conceded that he had never heard of an instance where an inmate had concealed contraband in his hair or beard. Coombe, Tr. 374-75. Furthermore, the governmental objectives of discouraging and detecting contraband in long beards may be served by the search procedures currently in effect. Inmates are searched periodically with metal detectors. In addition, during contraband searches the inmate is required to run his fingers through his hair and beard. If the correction officer suspects that something is still concealed, he himself can run his fingers through the inmate's beard and hair. Coombe, Tr. 373. Therefore, less restrictive alternatives are available to deal with the contraband problem.

Fairness

Defendants argue that the one-inch beard requirement is a neutral, consistent rule that can be understood easily by both staff and inmates. Allowing exceptions to fair and uniform regulations, defendants claim, creates confusion, resentment, and opportunities for confrontation between inmates and guards.

Defendants' position is belied by the fact that numerous DOCS directives already provide for exemptions for prisoners who have sincerely held religious beliefs. For example, "American Indians involved in scheduled and approved Indian cultural ceremonies" need not comply with the portion of Directive #4914 that requires long

hair to be tied back in a ponytail. Directive #4202 provides that dietary requirements and the restrictions on activity of an inmate's Sabbath should be observed, and allows inmates to wear various religious items. Pl. Ex. 20. Pochoda testified that prisoners do not resent exemptions for other prisoners based on sincere religious belief as long as the exemption is based on a rule and all prisoners have the opportunity to demonstrate their religious interest. Tr. 432. To the limited extent that exceptions do result in confusion and resentment, these problems do not justify the impairment of Fromer's ability to observe his religious beliefs by growing his beard.

Safety and Hygiene

Defendants assert that an untrimmed beard can become caught in machinery and can pose a hygiene problem if the inmate is assigned to food service or if the beard becomes infested with vermin. Once again, we do not see a distinction between the situation presented by long hair and the situation presented by long beards. Inmates with long beards can be required to wear beard guards around machinery and food preparation areas or else be assigned to jobs not involving machines or foods. If vermin is detected in a beard, the inmate can be required to use a special shampoo to combat the problem or to cut his beard as a last resort.

CONCLUSION

Plaintiff has established that his refusal to trim his beard to comply with Directive #4914 is based on beliefs that are sincerely held and religious in nature. We conclude that defendants' interests in identification of inmates, control of contraband, fairness, safety, and hygiene can all be served with alternatives less restrictive than requiring Fromer to trim his beard. Thus, defen-

dants have failed to show that the limitation on Fromer's religious freedom occasioned by the beard restriction are no greater than necessary to effectuate the governmental objectives asserted. *See Wali*, 754 F.2d at 1033.

Accordingly, the portion of DOCS Directive #4914 requiring inmates to trim their beards to one inch in length is hereby declared unconstitutional as applied to Fromer. Defendants are hereby enjoined from trimming, shaving, or in any other way shortening Fromer's beard; from ordering Fromer to trim, shave, or otherwise shorten his beard; and from punishing Fromer for refusing to trim, shave, or otherwise shorten his beard. Furthermore, defendants are ordered to restore to Fromer all good time credits and any other privileges and benefits lost because of his past refusals to trim his beard. Defendants must also expunge from Fromer's record all references to disciplinary proceedings held because of the violation.

SO ORDERED.

Dated: New York, New York
November 25, 1986

/s/ Charles E. Stewart
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK CONSOLIDATING HEARING ON PRELIMINARY INJUNCTION WITH TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YEVGEN FROMER,

Plaintiff,

-against-

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III, and HIRSHEL JAFFEE,

Defendants.

84 Civ. 5612(CES)

ORDER

STEWART, District Judge:

Pursuant to Fed. R. Civ. P. 65(a)(2), the hearing on plaintiff's application for a preliminary injunction, scheduled for July 23, 1985, is to be consolidated with a trial on the merits with respect to the Eighth and Ninth Causes of Action set forth in the Amended Complaint. As to these two causes of action, defendants' pending motion to dismiss is denied, without prejudice.

SO ORDERED.

Dated: New York, New York
July 8, 1985

/s/ Charles E. Stewart
United States District Judge

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES DIRECTIVE NO. 4914, AS REVISED

Classification	Distribution	Date
# 4914	A&B	1/5/84

Supersedes Directive # 4914 Dated 1/18/82
and Revision Notice Dated 2/2/82
Subject: INMATE GROOMING STANDARDS

I. DESCRIPTION

This directive establishes the basic grooming standards (including criteria for beards, mustaches, and length of hair) for inmates.

II. STANDARDS

Reference is made to Rule 3.20 of the Standards of Inmate Behavior: "Beards and mustaches are not to exceed one (1) inch in length."

It is especially important that inmates who are assigned to temporary release programs present a "neat and clean" appearance.

III. REGULATIONS

A. Initial Haircut and Shave at Reception

Males received as new commitments shall get an initial haircut and shave for reasons of health and sanitation as well as to permit the taking of the initial identification photograph. Hair length upon completion of this initial haircut shall not exceed one (1) inch on any part of the head. For the purpose of the initial clean shaven identification photograph, inmates who have a beard upon reception shall be permitted the option to use an electric razor, hand clippers, or a depilatory to remove their beard.

Department of Correctional Services Directive No. 4914

B. General Grooming Standards

After the initial haircut and shave, general grooming standards as set forth below are applicable to all inmates.

1. Beards and Mustaches

All inmates may grow a beard and/or mustache not to exceed one (1) inch in length.

2. Hair

a. Hair may be permitted to grow over the ears to any length desired by the inmate. The corn row style is allowed. The hair must be neatly groomed and kept clean at all times.

b. When an inmate wears long hair and is assigned to work near machinery or food, he will be required to wear a hair net.

c. Inmates wearing long hair will be required to have the hair tied back in a ponytail with a barrette, rubber band, or other fastening device approved by the Superintendent. This restriction does not apply to American Indians involved in scheduled and approved Indian cultural ceremonies.

d. An inmate may be subjected to a hair search when there is reason to believe that contraband may be discovered by such a search. He may be subjected to such search at any time that a pat or strip frisk is being conducted.

Department of Correctional Services Directive No. 4914

C. Photographs

If, in the opinion of a Correction Officer or Supervisor, an inmate drastically changes his appearance by changing the length of his hair or growing or shaving a beard and/or mustache, he will be rephotographed for identification purposes. All such rephotographs will be at the expense of the inmate.

Department of Correctional Services Revision to Directive No. 4914

Classification	Distribution	Date
# 4914	A&B	4/24/84

Revises Directive # 4914 Dated 1/5/84
Subject: INMATE GROOMING STANDARDS

Please add the following NOTE to the above referenced directive immediately following Section III-B-2-c on page 2.

NOTE: Long hair is defined as shoulder length or longer. If shoulder length or longer, it should be tied back.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT N. JONES, THOMAS A. COUGHLIN, III and HIRSHEL JAFFEE

Petitioners,

-against-

YEVGEN FROMER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

JOEL W. STERNMAN
(Counsel of Record)
AMBROSE DOSKOW
NEIL A. MILLER

ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Respondent
Yevgen Fromer

No. 87-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN, III and HIRSHEL JAFFEE

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ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Respondent
Yevgen Fromer

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No. 87-169

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN, III and HIRSHEL JAFFEE

Petitioners,

-against-

YEVGEN FROMER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Yevgen Fromer respectfully submits this brief in opposition to the petition of Charles J. Scully, Harold J. Smith, Walter Kelly, Everett W. Jones, Thomas A. Coughlin, III and Hirshel Jaffee for a writ of certiorari.

Both courts below held that a directive of the New York State Department of Correctional Services ("DOCS") (Directive #4914) limiting the permissible length of a prison inmate's beard to one inch is unconstitutional as applied to respondent, an Orthodox Jew whose religious belief prohibited the cutting of his beard. Petitioners seek certiorari on the sole ground that the decision of the Court of Appeals conflicts with the later decisions of this Court in Turner v. Safley, 107 S. Ct. 2254 (1987) and O'Lone v. Shabazz, 107

S. Ct. 2400 (1987). Petitioners ask this Court to grant certiorari, summarily vacate the judgment below and remand the case to the Court of Appeals for the Second Circuit for reconsideration in light of the Safley and Shabazz cases. For the reasons to be stated, it is submitted that such prolongation of the litigation is unwarranted and that the petition should be denied.

The Conflict

The courts below, following the decision in Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985), reviewed the challenged Directive under the standard of "strict scrutiny", placing the burden on the State to show that the challenged denial of respondent's religious freedom "is necessary to further an important governmental interest" and that "the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved" (App. at 9a, 33a).[1]

In Safley, this Court rejected the "hierarchy of standards of review" described in Wali. It announced the single standard that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 107 S. Ct. at 2261. The same rule was restated in Shabazz, 107 S. Ct. at 2404.

The conflict on which petitioners rely is thus a conflict between the opinions of the courts below and those of this Court in its two later cases. This Court, however,

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1 App. refers to the Appendix to the Petition.

"reviews judgments, not opinions."[2] In each of the cases, there was a trial of the factual issues as to the relation between the constitutional rights of the plaintiff inmates and the governmental interests asserted by the defendant officials. It is submitted that the differences between the resulting judgments do not present any issues which would warrant intervention by this Court or further consideration of this case in the courts below.

The Proceedings Below

The District Court decision below was reached after a six-day trial. Two issues were tried: the sincerity of respondent's belief that the cutting of his beard would be contrary to his religious convictions, and whether the Directive, as applied to respondent, was justified by any of the considerations advanced to support it. On both issues, the District Court carefully reviewed the evidence and decided in respondent's favor (App. 19a-39a). The Court granted respondent declaratory relief and an injunction against enforcement of the Directive (App. 15a-16a). On appeal, petitioners abandoned their attack on the sincerity of respondent's religious convictions and contended solely that the Directive could constitutionally be enforced against him. The Court of Appeals unanimously affirmed; it specifically considered each challenge by petitioners to the findings of the District Court and found them without merit (App. 1a-14a).

After the decision below, but before the Petition was

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2 Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956).

filed, respondent was released on parole.[3] While this did not render the case moot,[4] it did deprive it of its practical significance. Respondent is now free to leave his beard uncut without the benefit of the injunction. And in future cases petitioners will have the benefit of the lighter burden of proof under Safley. Accordingly, if certiorari were granted, the only issue on remand would be whether the conclusion reached by the courts below may be sustained under the standard of reasonableness announced in Safley. That issue, it is submitted, does not merit a grant of certiorari. It will be shown that the judgment below is compatible with the standard announced by this Court and that, in any event, further litigation on the subject could produce no benefit to petitioners.

The Compatibility of the Decision Below with Safley and Shabazz

While this Court's emphasis on the deference owed to judgments of the prison authorities effects a change in the burden of proof from that applied below, the Safley opinion itself recognized the limits to that deference; it affirmed a decision reached by the lower courts under the strict

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3 The Court and petitioners were informed of his parole by letter from respondent's counsel to the Clerk of the Court, dated August 5, 1987.

4 Respondent had been subjected to disciplinary action including solitary confinement which was terminated only when the District Court, by temporary restraining order, so directed. The relief granted by the District Court after trial included the expunging of the disciplinary action from his record, and any issue as to that relief is not mooted by his parole. Cf. Hewitt v. Helms, 107 S. Ct. 2672, 2679 n. 1 (1987) (dissenting opinion) ("[p]etitioners have offered no authority, nor can they, for the remarkable proposition that the request for expungement of respondent's record became moot upon his parole". The majority opinion did not dispute this point.)

scrutiny standard invalidating a Missouri restriction on the right of prisoners to marry.

Moreover, the reasoning in both the Safley and Shabazz opinions, despite their rejection of the Wali rule, is not irreconcilable with the decision of the courts below in this case. In both, the Court recognized the need to seek a "balance" between the First Amendment rights of inmates and the penological objectives as to which deference is due to the judgment of the authorities. Safley, 107 S. Ct. at 2261; Shabazz, 107 S. Ct. at 2404. Despite its statement of the new standard in terms only of concern for prison administration, the Court in Safley noted the teaching of Pell v. Procunier, 417 U.S. 817, 824 (1974) and later cases that "in determining the scope of the burden placed by the regulation on inmates' First Amendment rights . . . it is appropriate to consider the extent of this burden 'when we [are] called upon to balance First Amendment rights against [legitimate] governmental interests.'" 107 S. Ct. at 2261.

Both Safley and Shabazz were decided after trials of the facts such as that held by the District Court in this case. On their facts, both are plainly distinguishable from this case. In Safley, the prohibition against correspondence between prisoners in different institutions was justified by evidence of the existence of prison gangs and the efforts of the authorities to break them up. Such correspondence was shown to "threaten the core functions of prison administration, maintaining safety and internal security" and to have a potential "ripple effect" on the inmates and staff of more than one institution. 107 S. Ct. at 2363. In Shabazz, the regulation, which had been upheld by the District Court but

invalidated by the Court of Appeals, prevented Muslim inmates from attending Friday afternoon services. That result could not be avoided, despite efforts by the authorities to do so, without incurring substantial security risks and added administrative burdens.

The record in this case contains no evidence of security problems comparable to those in Safley and Shabazz. Indeed, applying the rule of those cases, one District Court recently upheld the sufficiency of a complaint challenging the provision of the Directive at issue here. In Ross v. Coughlin, 86 Civ. 1277 (SWK) (S.D.N.Y. Aug. 3, 1987) (Westlaw), the Court declared (at 4) that "[u]nder the new standard of 'reasonably related' the government has not shown that the 'beard-trim' regulation in Directive #4914 is logically related to legitimate governmental interests to deprive a prisoner of First Amendment rights."

Moreover, in an earlier case brought by a Rastafarian, petitioner Coughlin, the DOCS Commissioner, had consented to the very relief granted by the courts below. In Phillips v. Coughlin, 586 F. Supp. 1281 (S.D.N.Y. 1984), he entered into a Stipulation of Partial Settlement, a copy of which was appended to respondent's brief in the District Court and is an appendix hereto. That Stipulation provides (at RA-2 - RA-3) that "neither DOCS nor any of its agents or employees will cut, shave, order the cutting or shaving or otherwise shorten, remove or comb out plaintiff's hair or beard at any time during his current term of incarceration or any subsequent reincarceration in the event that plaintiff is able

to obtain a retrial and is reconvicted on the same charge."[5]

The Safley opinion describes four factors as relevant in determining the reasonableness of a challenged regulation. Petitioners discuss those factors for their bearing on the decision below. That discussion, it is submitted, is unconvincing. As to each of the factors, the record undermines the purported justification.

First, as to the existence of "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it" (Safley, 107 S. Ct. at 2262), petitioners cite the "expert testimony of Deputy Commissioner Coombe regarding the prison administration's interests in facilitating identification and inhibiting the possession of contraband" (Petition at 20). Of course, no expert testimony is required to establish the existence or importance of those administrative interests. Their application here is rendered suspect not only by the Phillips Stipulation quoted above, but also by other provisions of the prison regulations and by specific testimony of Coombe referred to in the opinion of the District Court. As to identification, Directive #4914 provides that if in the opinion of prison officials an inmate drastically changes his appearance by changing the length of his hair or growing or shaving his beard, he will be rephotographed at the inmate's

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5 Both Phillips and Ross also involved another provision of Directive #4914 which requires that each incoming prisoner be given an initial shave. The constitutionality of that requirement was upheld as a reasonable security measure in Phillips under the Second Circuit rule and in Ross under the Safley standard. Although respondent was subjected to the inital shave portion of the Directive (App. at 23a), its validity is not at issue here.

expense (App. at 43a).[6] In Phillips v. Coughlin, supra, the court referred to testimony of a deputy commissioner of the DOCS that "it is standard practice in the event of an escape for DOCS to supply its own staff and the police officers involved in security and recapture efforts with both current and clean-shaven photos of the missing prisoners." 586 F. Supp. at 1284.[7]

As to contraband, the District Court found that drugs or weapons could be hidden at least as easily in an inmate's long hair, clothing or body as in his beard, and it cited Coombe's testimony that he had never heard of an instance where an inmate had concealed contraband in his hair or beard. The Court also referred to Coombe's description of the present DOCS search procedures in which fingers are run through the beard and hair (App. at 37a).[8]

The second relevant factor identified in Safley "is

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6 As to the goal of identification of inmates, the District Court found that untrimmed beards would not lead to increased problems "[s]ince inmates may drastically change their appearances in numerous ways while still complying with Directive #4914" (App. at 35a). To the same effect, see Moskowitz v. Wilkinson, 432 F. Supp. 947, 951 (D. Conn. 1977), where the Court stated that "[t]he need for a no-beard rule to facilitate inmate identification is also undermined by the Bureau's present policy of allowing hair styles of any length as well as mustaches and sideburns."

7 Petitioners claim that rephotographing is not viable because of the multitude of pictures of long-bearded inmates that might be necessary (Petition at 19). That claim is rebutted by the District Court's finding quoted above that appearances may be changed in numerous permissible ways. Thus, the asserted necessity may exist under the present regulation. Petitioners offered no evidence of any problems caused by this regulation.

8 One court has noted that "it seems frivolous to suggest that beards are likely hiding places for contraband where inmates are permitted to wear three-inch Afro haircuts." Monroe v. Bombard, 422 F. Supp. 211, 217 (S.D.N.Y. 1976).

whether there are alternative means of exercising the right that remains open to prison inmates." 107 S. Ct. at 2262. Literal application of this factor as petitioners read it would completely destroy the freedom of religion protected by the First Amendment. Any religious person may engage in prayer; the fact that other rituals remain available is obviously no substitute for compliance with the tenet that facial hair should be uncut.[9] Petitioners' position would lead to the view that any arbitrary and capricious restriction of a religious practice should be upheld since other practices are available.

There is likewise no evidence in the record to justify the Directive on the third consideration mentioned in Safley, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally". 107 S. Ct. at 2262. Here again the Petition (p. 21) refers only to the testimony of the deputy commissioner that the alternative of rephotographing and searching beards "would significantly impact on both the allocation of resources and the potential for confrontation between inmates and correction officers". Compliance by the officers with DOCS directives is thus characterized as burdensome, with no evidence as to specific experience on the subject. In the cosmopolitan setting of a New York prison, guards and other inmates constantly associate with a variety of faces. The present record contains no evidence of a potential "ripple effect" on fellow inmates or on staff comparable to the organizational efforts

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9 Both the District Court and Court of Appeals found that requiring respondent to trim his beard would work a total deprivation of this tenet (App. at 11a-12a, 32a).

referred to in Safley, 107 S. Ct. at 2263, citing Jones v. North Carolina Prisoners Labor Union Inc., 433 U.S. 199 (1977).

As to the fourth factor, "the absence of ready alternatives", the Petition (p. 21) quotes the statement in Safley that a regulation may not meet the reasonable relationship test "if an inmate claimant can point to an alternative that fully accomodates the prisoner's rights at de minimis cost to valid penological interests." 107 S. Ct. at 2262. It then merely repeats the assertions advanced regarding the first three factors, and asserts that the supposed problems of recapturing escaped convicts, detecting dangerous contraband and increasing the likelihood of a confrontation between inmates and correction officers are "costs" which are "hardly de minimis". On the trial record, it must be held that these supposed costs are no greater than those imposed by compliance with other provisions of the Directive. The authorities, having adopted those provisions, obviously do not regard them as burdensome. The record establishes that the challenged Directive, like the marriage restriction condemned in Safley, represents an "exaggerated response" to petitioners' security objectives.

In short, application of this Court's "reasonableness" standard does not require enforcement, over respondent's religious objection, of a limitation on beards which has been found to be unnecessary in numerous other prison systems, including the Federal Bureau of Prisons (App. at 11a), and which petitioner Coughlin, the head of DOCS, himself found

unnecessary in the case of Phillips.[10]

Remand to the Court of Appeals is Inappropriate and Unnecessary

Petitioners ask that the judgment below be vacated and the case remanded to the Court of Appeals for reconsideration in light of the Safley and Shabazz cases. That procedure is generally followed where certiorari is sought to review a decision apparently inconsistent with a recent case in this Court or one which is pending here. The subject has been analyzed by Professor Hellman who described it as "[t]he most puzzling mode of disposition in the Supreme Court's repertory",[11] the extensive use of which has caused considerable confusion in the lower courts and at the bar.

Professor Hellman's statistical study of this Court's records over a number of terms has shown that in a significant number of cases the courts of appeals on remand have adhered to their prior decisions. He has noted (Second Thoughts p. 39) that

> "if there is even a surface inconsistency between the holding below and the new precedent, the Court will generally remand for reconsideration by the lower court.

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10 Indeed, the record warrants the surmise that the effort to enforce the Directive against respondent and the punitive action against him may be attributed to the misgivings of the officials about the sincerity of his religious convictions, an issue which was disposed of by the decision of the District Court from which no appeal was taken. The record shows that at least two-thirds of the pages in the trial transcript relate to respondent's sincerity and issues of Jewish law.

11 Hellman, The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions, 11 Hastings Const. L. Q. 5 (1984) (hereinafter "Second Thoughts"). See also Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review, 44 U. Pitt. L. Rev. 795 (1983).

> Seen in this light, the process begins to look very much like a species of review for error. Although denial of review is not, in theory, an affirmance, and a remand for reconsideration is not tantamount to reversal, the determination to invoke one mode of disposition rather than the other is governed by the same basic criterion that underlies the exercise of review for error: the correctness of the judgment below -- here judged by reference to the intervening Supreme Court decision."

It has been shown that here the only "inconsistency between the holding below and the new precedent" is in the standard of review applied, not in the judgments on wholly dissimilar prison regulations. The rule as to the standard of review is no longer an open question; it has been settled for all the courts by the Safley opinion.[12] On the proposed remand, the only question would be whether application of the new standard would warrant the conclusion reached on the facts as to which there has been a lengthy trial and appellate review.

For this Court to vacate the judgment and remand the case for that purpose would, as Professor Hellman states, "look very much like a species of review for error". While defending the practice in the few cases for which it is appropriate, such as situations in which the petition is held pending decision in a case already on the Court's docket,

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12 Cf. Oneida of the Thames Band v. State of New York, 771 F.2d 51 (2d Cir.), cert. denied, 106 S. Ct. 78 (1985). There the Court, on an interlocutory appeal, had reversed an order disqualifying counsel in a civil case. Following the decision of this Court in Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) that such an order was not appealable, the unsuccessful appellee in the Oneida case filed a petition for certiorari and also moved in the Second Circuit for recall of its mandate. The Second Circuit accurately predicted that this Court would deny the petition for certiorari, noting that the issue of whether an order disqualifying counsel was subject to an interlocutory appeal had been settled by this Court's decision in Richardson-Merrell which all other appellate courts are bound to respect in later cases.

Professor Hellman wrote (Second Thoughts p. 39):

> "At first blush, it may seem anomalous to find the United States Supreme Court engaging in something akin to review for error, and on a rather large scale at that: more than 100 cases in the 1981 Term alone, if we count (as we must) all held cases, whether the ultimate disposition be one of remand or denial of review. In recent years there has been widespread agreement that review for error should play at best a minor part in the Court's work, and that the Court should consider, in the words of the Justices, only cases 'of . . . general public importance or concern.'"

The present petition seeks application of the remand procedure to a petition filed after this Court's controlling opinions on the proper standard of review, not in one of the "held cases" where Professor Hellman finds it appropriate. In this situation the Court can avoid the radical departure from its proper role by simply denying certiorari. See Boag v. MacDougall, 454 U.S. 364, 368 (1982) (dissenting opinion of Rehnquist, J.).

The situation here is analogous to that in which a case becomes moot while a petition for certiorari is pending. Until 1978 the regular procedure in such cases was for this Court to vacate the judgment and remand the case to the Court of Appeals. However, as noted in the leading text on Supreme Court practice, Stern, Gressman and Shapiro, Supreme Court Practice, p. 723 (6th Ed. 1986):

> "[S]ince 1978, the Court has seemingly accepted the suggestion of the Solicitor General that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review. In such cases the Court merely denies certiorari, leaving it to the court of appeals to enter the appropriate order to vacate and dismiss. If the Supreme Court would otherwise take the case, or if the case comes to it by appeal instead of on certiorari, it will enter such an

order itself."[13]

Since the standard of review applicable to respondent's constitutional challenge to the Directive has been resolved by this Court in Safley, the remaining issue, it has been shown, is whether, as contended above, the decision of the Court of Appeals is compatible with that standard. The issue of whether or not this Court would accept the contention that the decision below should be upheld under that standard plainly is not one for which review by certiorari should be granted.

Petitioners are not prejudiced by their inability to enforce the Directive against respondent, a former inmate now on parole. In any later cases on the issue, they will have a lighter burden of proof. Should they nevertheless deem it advisable to seek reconsideration by the Second Circuit of its judgment, they need no remand from this Court. As in the mootness cases, they can apply for relief directly to the Second Circuit. In Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429 (2d Cir.), cert. denied, 400 U.S. 829 (1970), plaintiffs against whom a judgment had been entered learned of a state court decision which indicated that the Court of Appeals had wrongly decided their case. While a petition for certiorari was pending, plaintiffs filed a motion in the Court of Appeals "for modification of

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13 A footnote to this sentence reads in part: "See brief for the United States in opposition to certiorari in Velsicol Chem. Corp. v. United States, No. 77-900, cert. denied, 435 U.S. 942 (1978). See also Local 102, Garment Workers v. United States, 439 U.S. 1070 (1979); Commodity Futures Trading Commission v. Board of Trade, 701 F.2d 653, 657 (C.A. 7, 1983), in which Judge Posner stated: '[T]he Court may have accepted' the Government's position in Velsicol, but 'it has never said' so. Compare Alabama v. Davis, 446 U.S. 903 (1980) (Stevens, J., dissenting)."

decision of the Court or for enlargement of the time to petition for rehearing." In granting them relief the Court wrote: "It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired." See also United States v. Certain Land, 420 F.2d 370, 371 (2d Cir. 1969) (motion to delete costs which had improperly been awarded granted as a petition for rehearing despite the fact that it was filed out of time).

Moreover, the Second Circuit, like every court of appeals that has considered the question,[14] has recognized its power to recall its mandate. See United States v. Dilapi, 651 F.2d 140, 144 (2d Cir. 1981), cert. denied, 455 U.S. 938 (1982); Fine v. Bellefonte Underwriters Ins. Co., 758 F.2d 50, 53 (2d Cir.), cert. denied, 106 S. Ct. 86 (1985) ("A motion to recall or modify the mandate may be made at any time and is referred to the judges who heard the appeal"); Oneida of the Thames Band v. State of New York, supra note 12. While such power is exercised only in exceptional cases, one situation in which it has been recognized to be appropriate is that in which there has been a conflicting decision of this Court. See In re Union Nacional de Trabajadores, 527 F.2d 602 (1st Cir. 1975); United States v. Kismetoglu, 476 F.2d 269 (9th Cir.), cert. dismissed, 410 U.S. 976 (1973);

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14 "Apparently, no court now takes the position that a federal tribunal lacks authority to recall its own mandate." American Iron & Steel Institute v. EPA, 560 F.2d 589, 593 (3d Cir. 1977), cert. denied, 435 U.S. 914 (1978). See also Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972); Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); Judkins v. Beech Aircraft Corp., 745 F.2d 1330 (11th Cir. 1984).

and Legate v. Maloney, 348 F.2d 164, 166 (1st Cir. 1965).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit and for remand to that Court should be denied.

September 1987

Respectfully submitted:

JOEL W. STERNMAN
(Counsel of Record)
AMBROSE DOSKOW
NEIL A. MILLER

ROSENMAN & COLIN
575 Madison Avenue
New York, New York 10022
(212) 940-8800

Attorneys for Respondent
Yevgen Fromer

APPENDIX: STIPULATION OF PARTIAL SETTLEMENT
IN PHILLIPS V. COUGHLIN, 586 F. SUPP. 1281
(S.D.N.Y. 1984)

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREVOR LLOYD PHILLIPS, Plaintiff, -against-	:	STIPULATION OF PARTIAL SETTLEMENT
THOMAS A. COUGHLIN III, et al.,	:	81 Civ. 7565 (WCC)

WHEREAS, TREVOR LLOYD PHILLIPS had initiated an action pursuant to 42 U.S.C. §1983 before the United States District Court for the Southern District of New York to redress alleged deprivations of rights under the First and Fourteenth Amendments to the Constitution of the United States of America; and

WHEREAS, the defendants have previously denied allegations of actions resulting in a deprivation of plaintiff's constitutional or statutory rights or entitlements; and

WHEREAS, the parties now desire to enter into a Stipulation for Partial Settlement of Trevor Lloyd Phillips' claims for relief.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their representative counsel, and counsel for the New York State Department of Correctional Services ("DOCS") that:

1. Plaintiff filed this action pro se, on December 7, 1981, while incarcerated at the Men's House of Detention on Riker's Island, a correctional facility under the jurisdiction of the Department of Corrections of the City of

New York.

2. By this action plaintiff sought to enjoin the enforcement of DOCS Directive #4914 upon his anticipated transfer to DOCS custody. Plaintiff alleged that the enforcement of that Directive's haircut and shave requirement would violate his religious beliefs as a Rastafarian.

3. Plaintiff was transferred to Ossining Correctional Facility ("Ossining") on March 11, 1982.

4. At the time of his arrival at Ossining, plaintiff had a beard and wore his hair in "dreadlocks".

5. Although plaintiff stated that he objected on religious grounds to the cutting of his hair or beard, and informed corrections officers of the pendency of his lawsuit, his beard was shaved for the purposes of taking an identification photograph pursuant to Directive #4914. At no time did plaintiff consent to the shaving of his beard.

6. Plaintiff does not allege that he was physically abused apart from the involuntary shaving of his beard.

7. Plaintiff's hair was not cut at the time his beard was shaved, and has not been cut to date. Plaintiff was subsequently allowed to regrow his beard.

IT IS FURTHER STIPULATED AND AGREED that neither DOCS nor any of its agents or employees will cut, shave, order the cutting or shaving, or otherwise shorten, remove or comb out plaintiff's hair or beard at any time during his current term of incarceration or any subsequent reincarceration in the event that plaintiff is able to obtain a retrial and is

reconvicted on the same charge. However, other than as stated in the preceding sentence, defendants do not waive the requirements of Directive #4914 that plaintiff's hair and beard be maintained in a clean manner at all times, that plaintiff be required to wear a hair and beard net if he is assigned to work near machinery or food, that plaintiff be required to have his hair tied back in a ponytail with a barrette, rubber band or other fastening device approved by the Superintendent or that plaintiff may be subjected to reasonable hair searches when there is reason to believe that contraband may be discovered by such a search; and

IT IS FURTHER STIPULATED AND AGREED that only remaining issues for litigation are plaintiff's right to and amount of damages, if any, resulting from defendants' involuntary shaving of plaintiff's beard; and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of resolving said issues:

1. Defendants will not contest plaintiff's sincere adherence to his asserted religious beliefs relative to the maintenance of hair and beard as a Rastafarian.

2. Except as to the issue of damages, for the purposes of this action, neither defendants nor plaintiff will present any argument or evidence, either testimonial or documentary, as to the correctional or security justifications underlying the promulgation and enforcement of Directive #4914.

IT IS FURTHER STIPULATED AND AGREED that this Stipulation of Partial Settlement is and shall be limited to this action. Nothing agreed to shall be deemed a waiver by

defendants of their enforcement of DOCS Directive #4914 except as explicitly provided herein. Further, the provisions of this Stipulation shall not operate to prohibit the interposition or introduction by the respective parties to this action of any evidence, argument, or defense waived for the sole purpose of this action in any subsequent or extant litigation relevant to this Directive.

IT FURTHER STIPULATED AND AGREED that irrespective of the decision of the Court as to the remaining issue of damages as described above, the agreements contained in this Stipulation of Partial Settlement and any Order based thereon will remain in force and

(a) will be filed in plaintiff's DOCS Central Office file;

(b) will be filed in plaintiff's Service Unit file;

(c) will be filed in plaintiff's Counsellor's file;

(d) will be filed in plaintiff's institutional file;

(e) will be delivered to the plaintiff, who will be permitted to keep it on his person at all times, including during any transfer between facilities.

IT IS SO STIPULATED.

Dated: New York, New York
September 2, 1983

/s/ Joyce Andren
JOYCE ANDREN
Assistant Attorney General
State of New York
Two World Trade Center
New York, New York 10047
Attorney for Defedants

Dated: New York, New York
September 1, 1983

/s/ [illegible]
OFFICE OF COUNSEL
New York State Department
of Correctional Services
Building 2
State Office Campus
Albany, New York 12226

Dated: New York, New York
September 2, 1983

/s/ Janet Neustaetter
JANET NEUSTAETTER
1 Chase Manhattan Plaza
New York, New York 10005
Attorney for Plaintiff

SO ORDERED:

/s/ William C. Conner
WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
September 6, 1983

No. 87-169

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III and HIRSHEL JAFFEE,

Petitioners,

– against –

YEVGEN FROMER,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
Office and P.O. Address
120 Broadway
New York, New York 10271
(212) 341-2647

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

DOUGLAS D. ARONIN
MARTHA O. SHOEMAKER
Assistant Attorneys General
of Counsel

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IN THE

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CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III and HIRSHEL JAFFEE,

Petitioners,

– against –

YEVGEN FROMER,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted by petitioners in reply to respondent's brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Argument

In his brief in opposition, respondent concedes, as he must, that the rationale of the court of appeals is incompatible with the holdings of this Court in *Turner* v. *Safley*, 107 S. Ct. 2254 (1987) and *O'Lone* v. *Shabazz*, 107 S. Ct. 2400 (1987). Brief in opp. at 2. He nevertheless

contends that this Court should deny certiorari on the grounds that the judgment of the court of appeals is compatible with *Safley* and *Shabazz* and that "further litigation on the subject could produce no benefit to petitioners." *Id.* at 4. Both of these contentions are without merit.

The policies upheld in *Shabazz* furthered interests significantly less critical to the successful operation of a prison than the interests furthered by Directive #4914. They also had a far greater impact upon the exercise of religion than is the case here. In *Shabazz*, the policies were upheld on the basis of the government's interest in preventing congestion and delay at the prison's main gate and simulating the environment prisoners will face when they return to society. Here, the challenged Directive serves interests absolutely essential to the security of a prison: identification of inmates and control of contraband. Further, the policies sustained in *Shabazz* prevented Muslim inmates from engaging in a religious practice which is central to the Muslim faith; here, the court below did not find that the right to grow a beard plays a central role in respondent's practice of his faith.

Referring to the third *Safley/Shabuzz* factor, the impact that accommodation of the constitutional right would have, respondent asserts that there is "no evidence as to specific experience" of the "ripple effect" which would result from abandonment of the Directive. Brief in opp. at 9. Respondent fails to explain how petitioners could obtain such "specific experience" except by repealing the regulation on an experimental basis. No possible reading of *Safley* and *Shabazz* would require such an experiment.

Respondent has appended a stipulation of partial settlement in *Phillips* v. *Coughlin*, 586 F. Supp. 1281 (S.D.N.Y. 1984) to his brief in opposition to the petition. This stipulation appears to be cited by respondent as evidence of DOCS' policy or to render "suspect" the policy

justifications for the beard length regulation at issue here. It is, of course, not evidence of policy. The stipulation expressly provides that it does not constitute a waiver of enforcement of Directive #4914 except as explicitly provided and that it does not act as a bar to the introduction of any supportive evidence or argument in any subsequent litigation. RA-3-RA-4[1]. Furthermore, the waiver of a policy with respect to a sole individual simply does not demonstrate the invalidity of the rationale for the policy generally.

Respondent states that *Ross* v. *Coughlin*, 86 Civ. 1277 (S.D.N.Y. Aug. 3, 1987), a district court decision rendered after *Shabazz*, demonstrates the continued invalidity of the directive under *Safley's* standards. The decision in *Ross*, however, was made on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court merely held that "the standards in *Turner* v. *Safley* applied in this case, *could* afford Ross relief." [Westlaw at p.8] (emphasis supplied). It does not constitute a finding based on a full record (such as the one presented here) that the Directive is invalid under *Safley*.

Contrary to respondent's assertion, respondent's release on parole has not deprived this case of its practical significance. First, although the Second Circuit invalidated the Directive only as to plaintiff, the decision analyzes the validity of the Directive itself. Second, even as to plaintiff himself, the judgment has a significant impact in that it requires the expungement of his records; will prevent the re-imposition of the directive in the event respondent violates his parole; and will have a direct

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[1] RA_ is a reference to the Appendix to the Brief of Respondent in Opposition.

bearing upon plaintiff's claim for damages, Petition at 17a-18a and his motion for $350,000 in attorney's fees. [2]

Respondent claims that a vacatur and remand in this case would be an inappropriate use of this Court's discretionary power of certiorari. He attempts to analogize vacatur on the merits, as sought here, to vacatur for mootness. Respondent claims that this Court appears to have decided "that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review." Brief in opp. at 13. (quoting Stern, Gressman & Shapiro, *Supreme Court Practice*, at 723 (6th ed., 1986)). It is by no means clear, however, that this statement accurately reflects this Court's current practice, *see id.* at 723 n. 28; *Honig* v. *Students of California School For The Blind*, 105 S. Ct. 1820 (1985). *See also*, 13A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, § 3533.10 (2d ed. 1985). Even if it were true, the analogy is inapt; respondent concedes that the instant case is not moot and cites no authority to suggest that this Court declines to vacate judgments based on opinions inconsistent with opinions of this Court.

Respondent notes critically that "if there is even a surface inconsistency between the holding below and the new precedent, the Court will generally remand for reconsideration by the lower court." Brief in opp. at 11 (quoting Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1985)). Regardless of the accuracy of this statement or the validity of the criticism, a remand is appropriate in this case, where the court of appeals' application of a concededly erroneous standard is hardly a "surface in-

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[2] Respondent's motion for fees was filed in the district court on July 20, 1987, and is being held in abeyance pending determination of this petition.

consistency." Furthermore, the validity of beard regulations in the prison context is a subject which arises frequently [3] and is worthy of this Court's consideration. Because the courts below did not have the opportunity to rule on that issue using the *Safley* and *Shabazz* standards established by this Court, the cause should be remanded in the first instance to the court of appeals for reconsideration in light of these recent decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Second Circuit vacated, and the case remanded to that court for reconsideration in light of *O'Lone* v. *Shabazz* and *Turner* v. *Safley*.

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[3] Regulations similar to the one at issue here have been upheld by the Eleventh Circuit, *see Maimon* v. *Wainwright*, 792 F.2d 133 (11th Cir. 1986); *Shabazz* v. *Barnauskas*, 790 F.2d 1536 (11th Cir. 1986) by the Third Circuit, *see Wilson* v. *Schillinger*, 761 F.2d 921 (3rd Cir. 1985); *Cole* v. *Flick*, 758 F.2d 124 (3d Cir. 1985), and by the Eighth Circuit, *Hill* v. *Blackwell*, 774 F.2d 338 (8th Cir. 1985). Other district courts have also considered the question. *See, e.g., Moskowitz* v. *Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977); *Monroe* v. *Bombard*, 422 F. Supp. 211 (S.D.N.Y. 1976); *Seale* v. *Manson*, 326 F. Supp. 1375, 1381 (D. Conn. 1971).

Dated: New York, New York
October 9, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
Office & P.O. Address
120 Broadway
New York, New York 10271

O. PETER SHERWOOD
Solicitor General and
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

DOUGLAS D. ARONIN
MARTHA O. SHOEMAKER
Assistant Attorneys General
of Counsel